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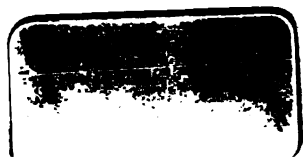
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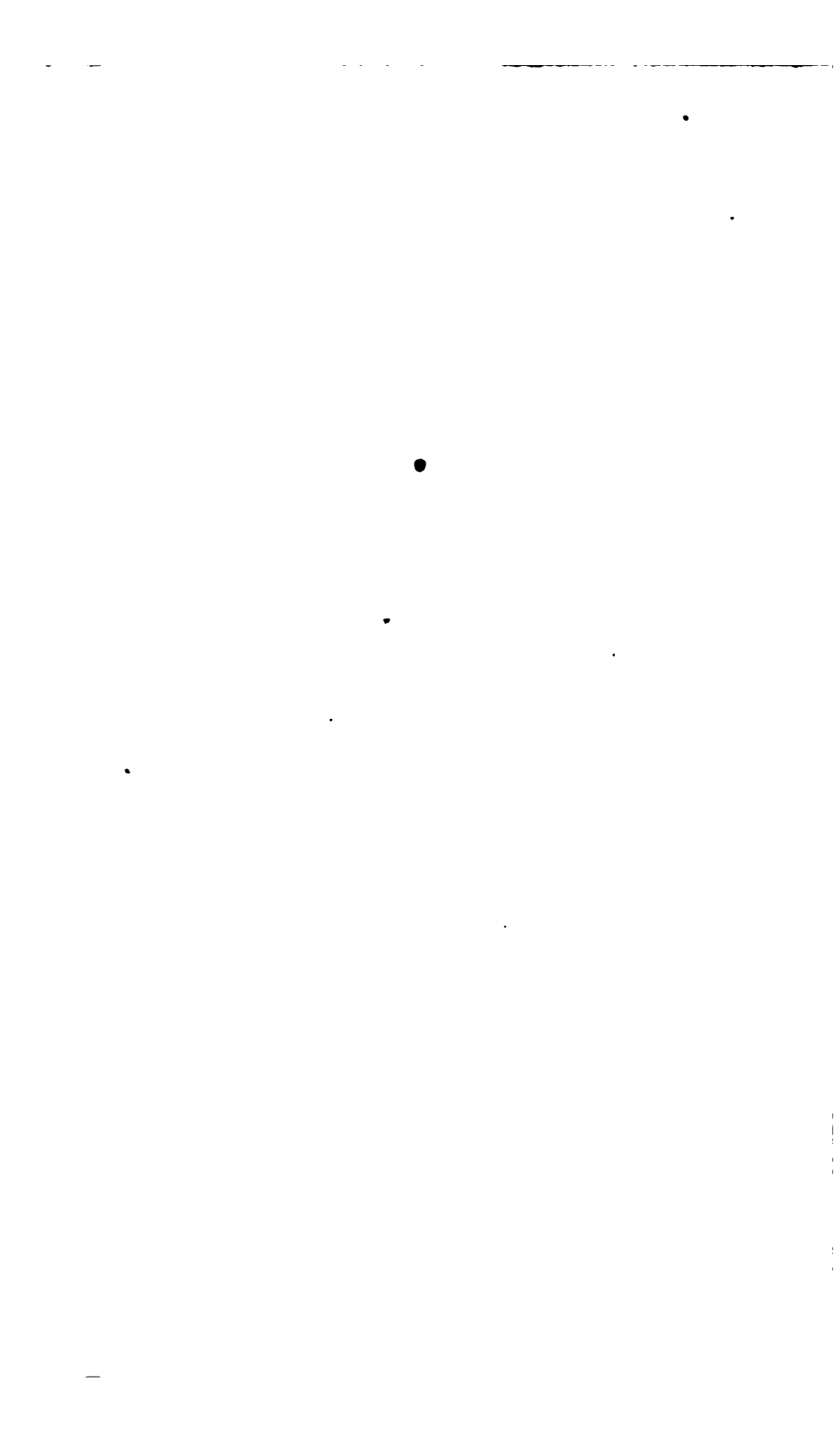
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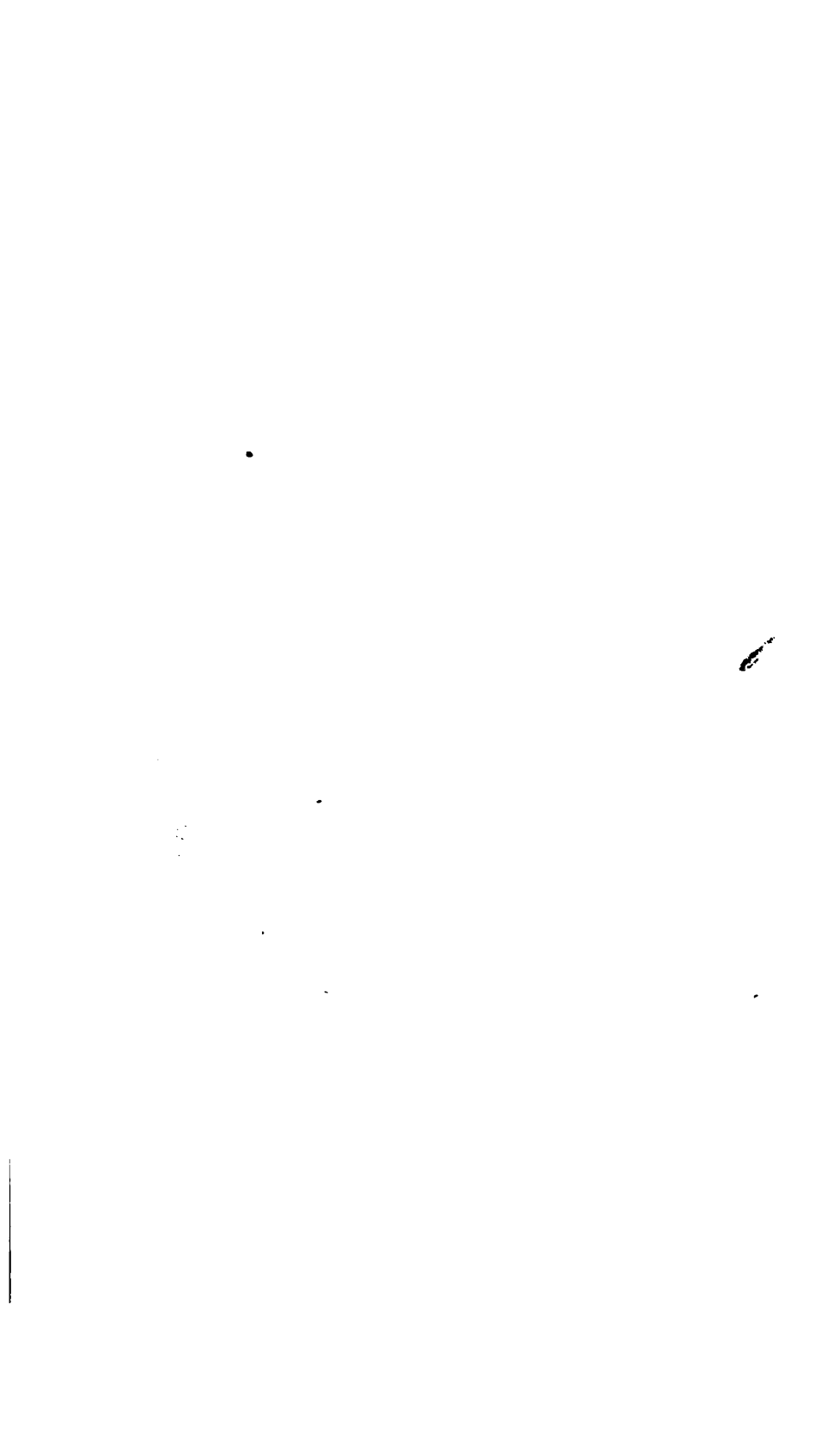
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THE
LAW STUDENTS' MAGAZINE,

WITH
ABRIDGMENTS OF PRACTICE CASES

AND
SUPPLEMENT.

JANUARY, 1849, TO DECEMBER, 1849.



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ADDITIONS, ERRATA, ETC.

P. 13, *line* 10 from top, *dele* "peace" and substitute, "Magistrates acting for the petty sessions division." See page 37.

P. 28. By 12 & 13 Vict. 2. c 110, s. 18, attorneys must sue in the county courts like other persons.

P. 140, *line* 10 from bottom, for "an abatement showing," read, "an abstract showing,"

P. 150. The Charitable Trusts' Jurisdiction Bill was withdrawn. See pp. 247, 248.

P. 172, *line* 11 from top, "cases, p. 16," read "cases, p. 25."

P. 183, *line* 5, after "admission," add "not."

P. 187, *line* 11 from top, for "2 Espon," read "2 Espin."

P. 217, *line* 7 from top, for "A. r," reads, "A's;" *line* 11, for "as," read, "was." A

P. 231. The case of Boosey v. Purday, deciding that a foreigner residing abroad has no copyright in England, is respited in 13 Jurist, p. 918,

P. 238. The act respecting the defective execution of leasing powers, has been suspended for a time. See vol. 2, N. S.

P. 246, *line* 3 from bottom, for "held to be exclusive," read "held to be inclusive."

P. 304, *line* 2 from top, for "which is will be," &c., read "which will be, &c."

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CONVEYANCING—LEASES.

It is intended to devote considerable attention to *Conveyancing*, particularly with reference to the necessity for the practitioner making his instruments conformable to the actual decisions of the courts. He who contents himself with following precedents (however well drawn) without adopting the modifications demanded by decisions will find that he is following a blind leader, and be liable to fall into serious mistakes. We have reserved a head among "LEADING CASES" for Conveyancing decisions, but we have thought the importance of two recent cases on the framing of leases demanded a more special notice than could be given in that place. The following are the decisions alluded to :—

Under-lease—Covenants to repair, &c.—Breach of—Damages—Form of under-lease.—The contract of an under-lessee is merely to perform the covenants in his under-lease, and not (unless there be a specific covenant for that purpose), to indemnify his lessor against any loss which he may sustain by reason of a forfeiture committed by the under-lessee. Thus it has been holden that the under-lessee is not liable to indemnify his lessor against the costs of an action at the suit of the original lessor for a breach of covenant committed by such under-lessee (*Penley v. Watts*, 7 Mees. & W. 601; *Walker v. Hatton*, 10 *Id.* 249, in effect overruling *Neale v. Wyllie*, 3 Barn. & Crea. 533,. This doctrine has received full confirmation, and even been extended as to its effects, in the late case of *Logan v. Hall* (4 Com. Bench Rep. 598; S. C. 11 Jur. 804). There premises were demised to the plaintiff and others for a term of years, commencing from March, 1829, and with covenants by the plaintiff to repair, and also to insure in the Protector Fire Insurance Office, or in such other respectable Fire Insurance Office in London or Westminster as the plaintiff and the other lessees should think fit. The demise then contained a proviso for re-entry in case of breach of covenants. By a lease, dated the 30th April, 1835, the plaintiff under-leased the premises to the defendants, for a term short of the original term, and with covenants to repair and insure precisely the same as those in the original lease to the plaintiff, except that the covenant to insure was to insure in the Protector Fire Insurance Office, or in such other respectable Fire Insurance Office in London or Westminster, as the defendants should think fit. The defendants had notice of the lease to the plaintiff, and of its contents. The Vol I. n. s.

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covenants to repair and insure having been broken, the plaintiff was ejected by the superior landlord. Held, that the plaintiff was not entitled to recover against the defendants, as damages for breach of covenant, the value of the reversionary interest in the term which he had so lost, there being no covenant by the defendants to indemnify. Mr. Justice Maule said: "The covenant is not to pay any damages which the plaintiff may have incurred by reason of the breach of a covenant which he has entered into. The defendants are liable only to pay such damages as follow from the breach of their covenant. But the present damages are not arising from the breach of the defendants' covenant, and the defendants cannot be liable for damages arising out of what they were not parties to, notwithstanding they may have had notice of the covenants entered into by the plaintiff. I, therefore, think that this case should be decided for the defendants, on the ground that the loss which is here sought to be thrown on the defendants does not properly arise from the breach of their covenant, but in consequence of a covenant by the plaintiff, to which the defendants are not parties."

The above case shows the necessity of attending to legal doctrines in framing an under-lease. There should either be a right reserved to the original lessee to enter to make the necessary repairs, and so himself perform the covenants of the original lease, or the under lessee should be made to covenant to pay the rent, and perform the covenants in the original lease, and to indemnify the lessee in case of non-performance. The following form would, we think, be found sufficient:—"And the said [*under-lessee*] doth hereby for himself, his heirs, executors, and administrators, covenant with the said [*original lessee*], his executors and administrators, that the said [*under-lessee*], his executors, administrators, or assigns, will henceforth pay the said yearly rent of £—, by the said lease reserved, and observe and perform all the covenants and conditions therein contained, and by the lessee, his executors, and administrators or assigns, henceforth to be observed or performed, and will keep the said [*original lessee*], his heirs, executors, and administrators, indemnified against all actions, suits, expences, losses, damages, and claims on account of the non-payment of the said rent, or any part thereof, or of the breach, or non-observance, or non-performance of the said covenants and conditions, or any of them."

Lease determinable on notice—Form of proviso.—It is by no means uncommon for a lease to have a provision for determining the term before its natural expiration, on a notice given at a certain time. In framing such a proviso in a lease, great care is required, so as not to permit the lease to be determined before all the covenants are performed. The point to which attention should be

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directed is, that the performance of all the covenants should be condition precedent to the determination of the lease. The courts indeed, have, where they could, so construed the proviso. Thus in *Porter v. Sheppard* (6 Term Rep. 655), where a lease was made for seven years, with a proviso that the lessee might determine the term at the end of the first three or five years, upon giving six months' notice, and after the expiration of such notice, upon payment of all rent and performance of the covenants, the lease should be void; it was held that mere notice was not sufficient to determine the lease, but that payment of rent and performance of covenants was a condition precedent. This establishes the general principle, where there is nothing else in the lease to rebut the presumption that it was intended that the performance of the covenants should be a condition precedent to the determination of the lease. But it frequently happens that there is also an express provision that, notwithstanding such determination, the lessor's remedies for any breach of covenant shall not be prejudiced. Now this is a provision that is not necessary if the lease is not to cease, and leads to the presumption that the parties intended that the lease should determine at the expiration of the notice, without reference to the performance of the covenant being a condition precedent. This was the case of *Friar v. Grey* (12 Jur. 913). There a lease contained a proviso that, if the lessee should give notice to quit eighteen calendar months before the end of the eighth year, then and in such case, all arrears of rent being paid, and all the covenants and agreements on the part of the lessee having been observed and performed, the lease, and every clause and thing therein contained, should, at the expiration of the eighth year, cease and determine; "but, nevertheless, without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." It was held that the performance of all the covenants by the lessee was a condition precedent to the determination of the lease. Lord Denman said: "The case of *Porter v. Sheppard* (T. R. 655), is directly in point, to show that the performance of all the covenants by the lessee is a condition precedent to the determination of the lease. In that case, however, no such words as those—'but nevertheless without prejudice,' &c., were introduced into the proviso. We are of opinion that their introduction into the present proviso makes no difference in the construction of it. They appear to be introduced for greater caution as regards the right of the lessor for breaches of covenant, which might be unknown to him at the expiration of the eight years, or possibly to meet the case of the lessor acquiescing in the notice given by the lessee although strictly the condition precedent might not be performed."

Besides which, they are applicable to *any* parties, and preserve the right of the lessees for any breach of covenant committed by the lessor. They are evidently introduced, not to qualify or do away with the condition precedent contained in the previous part of the proviso, but for a wholly collateral purpose."

Thus, then, though the court went a great length to support the position that the performance of all the covenants by the lessor was a condition precedent, yet it is better, by taking more care in framing the proviso, to obviate any question being raised. The proper mode would be to allow a notice to determine the lease to be given only where, at the time of its being given, the rents have been fully paid, and the covenants of the lease duly performed, and that all arrears of rent being paid and the covenants duly performed, the lease shall, at the proper expiration of the notice, &c., cease. It will be wholly unnecessary to provide that the remedy for breach of covenant shall not be affected, and thus there will be no repugnancy.

Form of notice to determine lease.—While upon the subject of leases determinable by notice, it may not be deemed irrelevant to refer to the care necessary in framing the notice, so that it shall be in conformity with the proviso in every respect, particularly as to the time of its expiration. Thus, where a lease commencing at Michaelmas was determinable at the end of the first fourteen years, and giving six months' notice "immediately preceding the end of the first fourteen years," it was held that a notice by the lessee in November of the fourteenth year, that he should deliver up the premises "on the 24th of June next, agreeably to the covenant in the lease," was bad, for varying from the proviso in the lease, although the jury found that the lessor understood the notice to be (as intended), to give up at the end of the fourteen years (Cassell v. Mortimer, 3 Per. & Dav. 386; S. C. 11 Ad. & Ellis, 720).

Farming lease—Consuming manure on premises, or bringing back an equivalent.—*Covenant in the alternative.*—We may here notice a case as to the covenants in a farming case for consuming the manure, &c., on the premises, or, if taken away, bringing back an equivalent. Although the case depended on a point of pleading, it is well deserving the attention of conveyancers. We allude to the case of *Richards v. Black* (12 Jurist, 963). In that case there was a covenant in a farming lease that the tenant should, during the term, consume on the premises for the improvement of the same, hay, straw, &c., which should grow or be made upon the premises, but in case he should take or sell off any part thereof, which he had liberty to do, then that he should, for every ton of hay or straw taken or sold off, bring back a certain quantity of manure within a certain space of time; it is a covenant in the alternative.

CASES OVERRULED, DOUBTED, ETC.

therefore, in an action for breach of such covenant, the declaration set forth only so much of the covenant as related to the consuming the crops on the premises, but omitted to traverse the tenant's having brought on the substituted quantity of manure, and assigned for a breach the selling off and carrying away certain crops, without converting the same into manure, it was held that the declaration was defective (and not amendable at the trial), and that the defendant was entitled to a verdict on a plea thereto of *non est factum*.

CASES OVER-RULED, DOUBTED, &c.

[It is, of course, not possible to give this head in every number, but we shall do so from time to time as we collect materials. These are not likely to be wanting looking at the number of cases now questioned or over-ruled by the courts. Indeed, the practitioner hardly knows when he gets hold of a case, whether he can rely on it or not. The reader would do well to note these cases in his reports.]

Andrews v. Powys (2 Bro. P. C. 504), as to equity determining validity of will, no authority. See *Middleton v. Sherburne*, 4 You. and Coll. 358.

Andrews v. Southouse (5 Term Rep. 292), devise subject to charge, observed on in *Peppercorn v. Peacock* (4 Jur. 1122; at law in 3 Scott, N. R. 651).

Anon. (1 Salk. 86, 88), as to attorneys appearing for parties without authority, over-ruled by *Bayley v. Buckland*, 1 Exch. Rep. 1; S. C. 16 Law Journ., N. S., Ex. 204; 11 Jur. 564.

Anon. (5 Sim. 322), as to Chancellor's ordering conveyance of lunatic's property, over-ruled by *re Shorrocks*, exp. Wallis, 1 Myl. and Cr. 640. But see *Meyrick v. Bowyer*, 8 Jur. 566.

Bickerton v. Burrell (5 Mau. and Selw. 383), as to agent in contract not suing as principal. Doubtful whether well decided on distinction of knowledge before action brought that party was really a principal (*per* Alderson, B., in *Rayner v. Grote*, 15 Mees. and W. 366). See 12 Jur. 1022.

Bariatinsky, re (1 Phill. 442), as to hearing counsel on cross-petition, over-ruled by *re Townsend*, 1 Phil. 804; S. C. 16 Law Journ., N. S., Chanc. 266.

Bosle's, Lewis, Case (11 Co. Rep. 79), as to tenant in tail after possibility of issue extinct, merger, &c., considered and explained in *Creagh v. Blood*, 3 Jones and La 133.

Brett v. Greenwood (3 You. and C. 230), as to giving wife whole property where husband insolvent, not followed in *Napier v. Napier*, 1 Dru. and Warr. 407. See further *Gardner v. Marshall*, 14 Sim. 575; S. C. 9 Jur. 958.

Cider Mill case, cited in *Lawton v. Lawton* (3 Atk. 13), as to fixtures, observed upon and treated as of no authority in *Fisher v. Dixon*, 1 Cl. and Fin. 312.

Claygate or Colegate v. Batchelor (Owen, 143; Cro. Eliz. 872), as to restraint of trade, over-ruled in *Green v. Price*, 13 Mees. and W. 695; S. C. 14 Law Journ., N. S., Exch. 105; 9 Jur. 857.

Cordwell v. Mackrill (2 Eden, 344), purchaser taking notice of an equity arising from ambiguous words, observed upon in *Thompson v. Thompson*, 1 Dru. and Warr. 459.

Doe v. Cook (7 East, 269), that bequest to other than executor for a limited period is gift of whole term where limitation over void, is not, it seems, sustainable. *Ker v. Dungannon*, 1 Dru. and Warr. 509.

Duncan v Chamberlayne (11 Sim. 123), notice of assignment of policy, over-ruled by *Thompson v. Speirs*, 13 Sim. 469.

Edwards v. Jones (1 Myl. and C. 226; S. C. 7 Sim. 325), as to voluntary imperfect gifts, observed upon in *Ward v. Audland* (8 Beav. 201; S. C. 14 Law Journ., N. S., Chanc. 145).

Elworthy v. Bird (2 Sim. and Stu. 372), as to covenants in separation deed, &c., observed upon in 5 Bing. N. C. 348, 349.

Ellis v. Nimmo (Ll. and Gou. temp. Sugden, 333), as to specific performance of voluntary agreement, treated as over-ruled by Sir E. Sugden himself in *Moore v. Crofton*, 3 Jon. and Lat. 442, 443.

Evans v. Williams 1 Cr. and Mees. 30), as to security after discharge of insolvent for old and new debt, explained in *Sheerman v. Thompson*, 11 Adol. and Ell. 1027; S. C. 4 Jur. 820.

Fitzsimon v. Burton (mentioned in Findlay on Renewals, 284, 311), dictum of Lord Eldon as to loss of renewal where all lives have dropped, doubted in *Butler v. Portarlington*, 1 Drury and Warr. 20; S. C. 1 Con. and L. 1.

Fortescue v. Barnett (3 Myl. and K. 36), as to imperfect assignments, commented on and explained in *Edwards v. Jones* (1 Myl. and Cr. 226), and in *Ward v. Audland* (8 Beav. 201; S. C. 14 Law Journ., N. S., Chanc. 145; 9 Jur. 384; 8 Beav. 201).

Forth v. Chapman 1 P. Will. 666), as to bequest to other than executor of a term for a day, being gift of whole term, not sustainable, *semble*. *Ker v. Dungannon*, 1 Dru. and War. 509.

Gaskell v. Gaskell (2 You. and Jerv. 502), as to trust not communicated, over-ruled by *Wheatley v. Purr* (1 Keen, 551), *Dummer v. Pitcher* (5 Sim. 35; S. C. 2 Myl. and K. 262).

Gullen v. Gullen (7 Sim. 236), as to consent of infant married woman to payment of money out of court, over-ruled by *Abraham v. Newcombe*, 12 Sim. 566.

Hall v. Smith (1 Barn. and Cr. 407), as to proof on joint estate upon note drawn by one partner for all, over-ruled in *re Clarke*, 1 Phil. 562; S. C. 1 De Gex, 153; 9 Jur. 931.

Hastletow v. Jackson (8 B. and C. 221; S. C. 6 Law Journ., O. S., K. B. 318), as to particulars of plaintiff's demand, a very doubtful case, *per* Pollock, C. B., in *Mearing v. Hellings*, 15 Law Journ., N. S., Exch. 168.

Hockley v. Bantock (1 Russ. 141), as to extent of liability of trustees for not investing, not to be relied on. See *Shepherd or Sheppard v. Moulds*, 5 Hare, 400; S. C. 9 Jur. 506, 508. See further, *Robinson v. Robinson*, 12 Jur. 969).

James v. Broek (16 Law Journ., N. S., Q. B. 168), as to costs of several issues over-ruled by *Elderton v. Emmens*, 17 Law Journ., N. S., Q. B. 277.

Jones v. Hill (7 Taunt. 392), as to case or assumpsit lying against the assignee of lessee for non-repair, &c., explained in *Burnett v. Lynch*, 5 B. and Cres. 600, 603.

Kerrick v. Bransby (7 Bro. P. C. 437), as to equity trying validity of will, no authority. *Middleton v. Sherburne*, 4 You. and Coll. 355.

Langford v. Knott (1 Jac. and Walk. 291), as to solicitor's costs being taxed by third party is over-ruled by the cases of *Balme v. Paver* (Jac. 305), and *Vincent v. Venner*, 1 Myl. and Ke. 212. See *Langford v. Mahoney*, 4 Dru. and Warr. 81; see now 6 & 7 Vict. c. 76.

Long v. Short (1 P. Will. 406), as to contribution and abatement corrected in *Jackson v. Hamilton* (9 Irish Eq. Rep. 430), in *Cornwall v. Cornwall* (12 Sim. 298), and in *Gervis v. Gervis* (14 Sim. 654; S. C. 16 Law Journ., N. S., Chanc. 422; 11 Jur. 580).

Lyon v. Reed (13 Mees. and W. 285), as to surrenders of leases by operation of law, approved in *Creagh v. Blood*, 3 Jones and Lat. 133.

Marsh v. Hunter (6 Madd. 295), as to extent of liability of trustees for not investing, not cited in *Hockley v. Bantock* (*supra*), and is now law. See *Sheppard v. Moulds*, 5 Hare, 400.

Newland v. Champion (1 Ves. 105), is explained in note to *Law v. Law*, 2 Coll. 4, and in 3 Jon. and Lat. 478, 481.

Otley v. Pensam (1 Hare, 324), as to confirming report, wrong, see *Beavan v. Gibert*, 8 Beav. 308.

Pettinwood v. Cooke (Cro. Eliz. 52), as to words of devise not expressing interest, questioned by Lord Ellenborough in *Bebb v. Penoyre*, 11 East, 162, and further noticed in *Doe dem. Atkinson v. Fawcett*,

or Fardett, 3 Com. B. Rep. 274; S. C. 10 Jur. 740; 15 Law Journ., N. S., C. P. 244.

Robinson v. Dugdale (2 Vern. 180), as to limitations to wife in a settlement, doubted by Vice-Chancellor in *Hansen v. Miller*, 8 Jur. 210.

Simpson v. Vaughan (2 Atk. 31), explained in Mr. Sanders's note thereto, and in 3 Jon. and Lat. 482.

Thomas v. Cook (2 B. and Ald. 119), as to surrender by operation of law, is not to be extended. See *Creagh v. Blood*, 3 Jones and Lat. 133.

Thompson, re (12 Sim. 392), as to conveyance by heir of mortgagee, not to be relied on. See 2 Daniell's Pract. 1727, n. b. 2nd edit.

White v. Briggs (13 Sim. 33), as to words of recommendation in will being a trust, over-ruled by L. C. 15 Sim. 33; S. C. 15 Law Journ., N. S., Chanc. 182.

White v. White (5 Beav. 221), as to giving power to trustees to appoint new trustees, doubted in *Oglander v. Oglander*, 12 Jur. 786.

Williams v. Williams (15 Ves. 419), as to tenant in tail after possibility of issue extinct, waste, merger, &c., considered and explained in *Creagh v. Blood*, 3 Jones and Lat. 133.

Woods v. Woods (1 Hare, 451; 1 Myl. and Cr. 401), as to gift to widow for support of self and family, explained 12 Jur. 236, 237.

RECENT STATUTES (11 & 12 VICTORIÆ).

Administration of Criminal Justice Act—Protection of Justices Act—Poor Removal Act—Removal of Defects in Criminal Proceedings—Accessories—Counts for Stealing and Receiving—Amending Indictment—Counts for Stealing and Receiving—Amending Indictment—Protection of Justices of the Peace—Poor Removal Act—Criminal Appeal Act—Game Certificates—Killing Hares.

The last session of Parliament (11 & 12 Victoriæ) was by no means unproductive of statutes of importance. It is true, we have no Bankruptcy or Insolvency Amendment Acts, but then to compensate this unwonted deficiency, we have some important acts relative to the administration of criminal justice, the protection of justices of the peace, the establishment of a court of criminal appeal, the amendment of poor law appeal procedure, the winding-up of joint

stock companies, and some others deserving attention. We shall in this number notice the acts relating to the administration of criminal justice, the protection of justices of the peace, the poor law appeal procedure, and some others, reserving the other acts to a subsequent number.

Removal of Defects in Criminal proceedings—Accessories—Counts for stealing and receiving—Amending Indictment. CHAP. 46.—This act is one of a very beneficial tendency, so far as relates to the trial of accessories, the insertion of counts in indictments for stealing and receiving stolen property, and the amendment of indictments in cases of variance between written matter and its statement in the indictment. As to *accessories*: in treason and misdemeanor there were none, but in felony there might be. Formerly accessories could not, without their own consent, unless tried with the principal be put on their trial before the principal had been convicted or outlawed. As to accessories before the fact, this was altered by the 7 Geo. 4, c. 64, ss. 9, 11, whereby they may be tried for a substantive felony, whether the principal has been convicted or not, or is amenable to justice or not. But, if indicted with the principal, and the latter pleaded any plea but the general issue, the accessory was not bound to answer until such plea had been determined; and if the general issue were pleaded, the jury were charged to enquire first of the principal, and if the principal did not appear at the trial, the accessory was not bound to plea (*Reg. v. Ashmall*, 9 C. and P. 236). Now, however, accessories before the fact to any felony (common law or statutory), may be indicted, tried, convicted, and punished in all respects, as if they were principal felons (sect. 1) and accessories after the fact (extending 7 Geo. 4, c. 64, ss. 9 and 11, to them) may be indicted and convicted, together with the principal, or after his conviction, or may be indicted and convicted of a substantive felony (whether the principal shall or shall not have been previously convicted, or shall or shall not be amenable to justice), and may thereupon, be punished in like manner, as any accessory after the fact to the same felony, if convicted as an accessory, and the offence of such person may be tried, &c. by any court which shall have jurisdiction to try the principal, as if the accessorial act had been committed at the same place as the principal felony; provided that such person, once duly tried for such offence, shall not be tried again for the same offence (SECT. 2).

Counts for stealing and receiving.—It was considered improper to include in the same indictment, counts for stealing property, and for receiving it knowing it to be stolen (*R. v. Galloway*, 1 Mov. C. C. 234; *R. v. Flower*, 3 C. and P. 413; *R. v. Maddison*, 1 M. C. C., 227). If included, the prosecutor was put to election; but now (s. 3). where such indictment is found, the p

secutor shall not be put to his election, but the jury may find a verdict of guilty either of stealing, or of receiving the property; and if two or more be so indicted, the jury may find all, or any of them guilty, either of stealing, or of receiving it knowing it to have been stolen, or find one or more of them guilty of stealing, and the other guilty of receiving.

Amending indictment—By sect. 4, any court of Oyer and Terminer and general gaol delivery, may cause the indictment or information for *any offence whatever*, when any variance shall appear between any matter in writing or print produced in evidence, and the setting forth thereof upon the record, to be forthwith amended in such particular, and thereupon the trial shall proceed as if no such variance had appeared,

Protection of justices of the peace. CHAP. 44.—Justices of the peace were protected by many statutes, but now the 11 & 12 Vict. c. 44 (operating from the 2nd of October, 1848), repeals many of those provisions and re-enacts same with considerable additions. By sect. 1, for an act by a justice of peace *within* his jurisdiction the action shall be on the case, and in the declaration it shall be expressly alleged, that such act was done maliciously, and without probable cause and be so proved, otherwise the plaintiff shall be nonsuited, or a verdict shall be given for the defendant. By sect. 2, for an act done by him *without* jurisdiction, or exceeding his jurisdiction, an action may be maintained without such allegation; but not for an act done under a conviction or order, until after such conviction or order shall have been quashed, either on appeal or application to the Queen's Bench; nor for an act done under a warrant to compel appearance, if a summons were previously served on him personally, or left with some person at his last or most usual place of abode and not obeyed. By sect. 3, if one justice make a conviction or order, and another grant a warrant upon it, the action must be brought against the former, not the latter, for a defect, in the conviction or order. By sect. 4, no action shall be brought for issuing a distress warrant for poors' rate by reason of any defect or that the party is not rateable. Nor shall an action be brought against justices for the manner in which they exercise a discretionary power. By sect. 5, if a justice refuse to do an act, the Court of Queen's Bench may by rule order him to do it, and no action shall be brought against him for doing the act thereby required to be done. By sect. 6, after conviction or order confirmed on appeal, no action is to be brought for anything done under a warrant upon it. By sect. 7, if an action be brought where by this act it is prohibited, a judge may set aside the proceedings. By sect. 8, an action against a justice must be brought within six calendar months next after the committing the act complained of. By sect. 9, one calen-

dar month's notice of action must be given to the justice. By sect. 10, the venue is to be laid in the county or district where the act complained of was committed, and the defendant may plead the general issue, and give any special matter, &c., in evidence. No proceedings are to be had in the county court if the justice objects thereto. By sect. 11, the justice may tender amends and pay money into court. By sect. 12, if the plaintiff do not prove that the action was brought within the proper time, or due notice given, or the cause of action as stated therein, or that such cause arose in the county or district as aforesaid, then he shall be non-suited, or a verdict shall pass against him. By sect. 13, if the plaintiff were really guilty, he shall not recover the penalty he paid nor more than twopence damages for any imprisonment. The words of this important section are, where the plaintiff shall be entitled to recover, and shall prove the levying or payment of any penalty or money under a conviction or order, as parcel of the damages he seeks to recover; or if he prove that he was imprisoned under it, and seek to recover damages for such imprisonment, he shall not recover the amount of such penalty or money, or any sum beyond twopence as damages for such imprisonment, or any costs of suit, if it be proved that he was actually guilty of the offence, or was liable by law to pay the sum so ordered to be paid, and (with respect to such imprisonment) that he has undergone no greater punishment than that assigned by law for the offence, or for non-payment of the sum.

Poor removal act. CHAP. 31.—Formerly it was required that every order for the removal of a pauper should be accompanied by a copy of the examinations upon which such order was founded; and as the courts in numerous cases had allowed many technical objections to the sufficiency of these examinations, a vast mass of litigation upon this subject alone had been accumulated, and still continued to be increasing without at all affecting the real merits of the case. This system has now been abolished by 11 & 12 Vict. c. 31, and many other useful regulations as to removal appeals made, particularly as to the finality of the decision of the sessions upon technical forms, the abandonment of orders upon payment of costs, and the abolishing the right to appeal after actual removal, though the time after notice of chargeability had elapsed. Sect. 1. repeals so much of the 4 & 5 Will. 4, c. 76, as requires that the notice of chargeability shall be accompanied by a copy of the examinations upon which the order of removal was made. By sect. 2, instead thereof, such notice shall be accompanied by a statement in writing under the hands of such overseers or such guardians, or any three or more of such guardians, setting forth the grounds of such removal, including the particulars of the settlement relied upon. On the hearing of any appeal the respondents are not to give evidence of any other grounds of re-

removal than those set forth in such statement. By sect. 3, copies of the depositions are to be furnished by the clerk to the justices on application and payment of twopence per folio. By sect. 4, upon the hearing of any appeal against an order of removal, no objection whatever on account of any defect in the form of setting forth any ground of removal or of appeal in any such statement shall be allowed, and no objection to the reception of legal evidence offered in support of a ground of removal or appeal alleged to be set forth in any such statement shall prevail, unless the court shall be of opinion that such alleged ground is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement, and to prepare for trial; and then the same may, on terms, be amended. By sect. 5, parties making frivolous or vexatious statement of grounds of removal or appeal may be ordered to pay the costs occasioned thereby. By sect. 6, power is given to the court to amend the order of removal on account of any omission or mistake in drawing it up. By sect. 7, the decision of the court upon the hearing of any appeal against any order of removal, as well as upon the sufficiency and effect of the statement of the grounds of removal and of appeal, and of the notice of chargeability, and of the copy or counterpart of the order of removal sent to the appellant parish, as upon the amending or refusing to amend the order of removal, or the statement of grounds of removal or appeal, shall be final, and shall not be liable to be reviewed in any court, by means of a writ of *certiorari*, or *mandamus*, or otherwise. Sect. 8 relates to abandonment of orders of removal and payment of the costs thereof. In any case in which an order for removal has been made, and a copy or counterpart thereof sent, the overseers or guardians obtaining such order, whether or not notice of appeal have been given, or entered or not, may by notice in writing, by post or delivery, abandon such order, and thereupon the said order of removal and all proceedings consequent thereon shall be null and void to all intents and purposes, and shall not in any way be given in evidence in case any other order of removal of the same person shall be obtained. But the abandoning overseers, &c., must pay the taxed costs incurred by the other party by reason of such order, and of all subsequent proceedings thereon. The costs to be taxed by the proper officer of the court before whom such appeal would otherwise have been heard. The taxed costs must be paid within ten days after demand, or the amount may be recovered in the same manner as penalties and forfeitures are recoverable under 4 & 5 Will. 4. c. 76. By sect. 9, no appeal shall be allowed against any order of removal if notice of such appeal be not given as required by law, within the space of twenty-one days after the notice of chargeability and statement of the grounds of removal shall have been sent by the

overseers or guardians of the removing parish to the overseers or guardians of the parish to which such order shall be directed, unless within such period of twenty-one days a copy of the depositions shall have been applied for as aforesaid by the last mentioned overseers or guardians, in which case a further period of fourteen days after the sending of such copy shall be allowed for the giving of such notice of appeal, but in such case no poor person shall be removed under such order of removal until the expiration of such further period of fourteen days. By sect. 10, all the provisions which relate to the sending and service of copies of orders of removal shall apply to such orders when suspended, and to all orders consequent upon such suspension, and to all copies of charges arising thereon and demands of payment of such charges. By sect. 11, the 4 & 5 Will. 4, c. 76, and all acts amending the same, are to be construed with this act as one act.

Justices of the peace performance of duty act. CHAP. 48.—This is a very important act for regulating the mode of proceedings before justices, but we find we must defer to our next number any mention of its numerous provisions.

Criminal Appeal Act. CHAP. 78.—This is a very important act, inasmuch as it introduces into the English law an appeal in criminal cases. It is true that it applies only to questions of *law*, and that even prior to this statute the judges of assize had the power to reserve points for the consideration of the judges. The act in fact extends this power to quarter sessions. It will be observed that the judge has a discretionary power to reserve or not the questions of law. No doubt this discretion will be exercised favourably to the prisoner, otherwise the act would do little to redeem the character of the English law from the reproach hitherto cast upon it. The act, after reciting that it is expedient to provide a better mode than that now in use of deciding any difficult question of law which may arise in criminal trials in any court of oyer and terminer and gaol delivery, &c., enacts that when any person shall have been convicted of any treason, felony, or misdemeanour, before any court of oyer and terminer, or gaol delivery, or court of quarter sessions (which includes borough sessions having a recorder, Reg. v. Masters, 12 Jur. 942), the judge or commissioner, or justices of the peace before whom the case shall have been tried, may, in his or their discretion, reserve any question of *law* which shall have arisen on the trial for the consideration of the justices of either bench, and Barons of the Exchequer, and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit; and in either case, the court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and

in such sums as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment or render himself in execution, as the case may be. By section 2, the judge or commissioner, or court of quarter sessions, is to state in a signed case the question or questions reserved, with the special circumstances upon which the same shall have arisen. This case is to be transmitted to the justices and barons, who are thereupon to have full power and authority to hear and determine the said question or questions, and thereupon to reverse, affirm, or amend the judgment on the trial, or to avoid such judgment. They may order an entry to be made on the record that the party convicted ought not to have been convicted, or arrest the judgment, or order judgment to be given thereon at some other session, if no judgment shall before that time have been given, or to make such other order as justice shall require. The judgment and order are to be certified under the hand of the presiding chief justice, or chief baron, to the clerk of assize or his deputy, or to the clerk of the peace or his deputy, who must enter the same on the original record in proper form, and transmit a certificate thereof (in the form given in the schedule to the Act), to the sheriff or gaoler in whose custody the person convicted shall be. By sect. 3, the jurisdiction and authorities given by the Act to the said justices of either bench, and barons of the Exchequer, shall and may be exercised by the said justices and barons, or five of them at the least, of which the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, or one of such chiefs at least, shall be part, being met in the Exchequer Chamber or other convenient place; and the judgment or judgments of the said justices and barons shall be delivered in open court, after hearing counsel, or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the superior courts of common law at Westminster or Dublin, as the case may be, are now delivered. By sect. 4, the case or certificate may be sent back for amendment. By sect. 5, when the judgment reversed on writ of error, the record may be remitted to the court below for judgment. By sect. 6, forging, or knowingly putting off, &c., any forged certificate or copy, certified as in sect. 2, is felony, punished with transportation for not exceeding ten years, or imprisonment for not exceeding three years, with or without hard labour and solitary confinement. The act is not to extend to Scotland.

Game certificates—Killing hares. CHAP. 29.—The 11 & 12 Vic. c. 29, enables persons having a right to kill hares in England and Wales, to do so, by themselves or persons authorised by them, without taking out a game certificate. By sect. 1, any person being

in the actual occupation of any inclosed lands, or any owner thereof, who has the right of killing game thereon, by himself or by any person directed or authorised by him in writing, according to the form in the schedule to the act annexed, or to the like effect, so to do, may take, kill, or destroy any hare then being in or upon any such enclosed lands, without the payment of any duties of assessed taxes, and without the obtaining of an annual game certificate. By sect. 2, the authority to kill hares is to be limited to one person at the same time in any one pariah, which authority is to be sent to the clerk of the peace, who is to register same. Notice of revocation of the authority must be given. By sect. 3, persons killing hares under the act are not on that account liable to the tax on gamekeepers. By sect. 4, any person may pursue and kill game or join in the pursuit or killing of any hare by coursing with grey, or by hunting with beagles or other hounds, without having obtained an annual game certificate. By sect. 6, the act is not to extended to the case of an agreement not to take, kill, or destroy game.

MISCELLANEA,

Court of justice prohibiting publication of proceedings pending a trial.—The judges of Ireland have, in the case of *Reg. v. Duffy*, prohibited the publication of the proceedings pending the trial. Much discussion has ensued as to the policy of this step, and in the *Jurist* is an article asserting its legality, which, of course, is quite a different question from that of the policy of such a step. The writer concludes thus:—Now if the court has authority to exclude the public, it follows that the public attending attends not *de jure*, but *dam se bene gesserit*; it attends by permission, on the implied understanding that it will do nothing inconsistent with the rules laid down by the court; in fact, submitting itself, for all purposes of conduct with reference to the court, to the jurisdiction. Hence it is a contempt of court in any person to publish proceedings contrary to the order of the court; although, by common practice, if the court makes no order, it is assumed that it permits reports (12 Jur. pt. 2, p. 530).

President of the Poor-law commission.—Mr. M. T. Baines, Queen's Counsel and M.P. for Hull, has been appointed head of the Poor-law department in the place of the late Mr. Charles Buller.

Mr. Justice Patteson.—It is very generally reported that Mr. Justice Patteson, one of the Justices of the Queen's Bench, intends very shortly to retire from the Bench.

Stealing and receiving stolen property—11 & 12 Vict. c. 46.—The only passage in the 11 & 12 Vict. c. 46, which appears to us to be ambiguous in any great degree, is the latter part of the third section; as to which we think a question might arise upon the words "it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property, or for receiving it, knowing it to have been stolen." Do these words authorise the finding of an alternative verdict? as *e. g.*, "we find A. B. guilty either of stealing the property, or of receiving it knowing it to have been stolen," or do they only confer upon the jury, after the whole case has been left to them, an option of finding a verdict of guilty of stealing, or a verdict of guilty of receiving, whichever they may consider best supported by the evidence? The latter we should consider to be the true construction, but looking closely at the words of the clause we imagine the former interpretation might well be contended for; and we cannot help thinking that until the question be set at rest by a judicial decision it is a fairly disputable point (9 Law Mag., N. S., 274).

Insolvent petitioners—Dates.—The Commissioners will not entertain a petition presented under 7 & 8 Vict. c. 70, unless the petitioner sets forth in the schedule annexed to such petition the date when each particular debt was contracted (Anon 36 Leg. Obs. 254).

Sureties under 1 & 2 Vict. c. 110, and 5 & 6 Vict. c. 122—"Gentleman."—Where a notice of sufficiency of sureties to a bond, given under the 1 & 2 Vict. c. 110, or 5 & 6 Vict. c. 122, sect. 13, described one of the sureties as a "gentleman," and he turned out to be a clerk, the commissioner refused to approve of the sureties (re Lysaghton, 35 L. Obs. 240).

Retainers of counsel.—The Incorporated Law Society have issued certain rules as to retainers of counsel, which it is wished should be acted on by the profession. We may notice these rules at some more convenient time. The following is the recommendation as to the amount of fees with retainers:—*General retainers*: In the Court of Queen's Bench, Common Pleas, and Exchequer, £5 5s; in Chancery and Bankruptcy appeals, £5 5s; in Parliamentary £10 10s; in the Privy Council, £10 10s.—*Special retainers*: At Common Law and in Equity, £1 1s; in Parliament, on bills and election committees, £5 5s; in appeals to the House of Lords, £2 2s; in the Privy Council, £2 2s.

Criminal appeals.—We have elsewhere noticed the 11 & 12 Vict. c. 78, giving an appeal in criminal cases where any difficult question of law arises, and we have stated that it is *discretionary* with the judge to grant or refuse the reservation of such question. However, in a letter of Lord Campbell to Mr. Baron Alderson, it is said: "A prisoner, as the law now stands (12 June, 1848), is not bound

by the refusal or admission of the judges to reserve a point in his favour. If you look at *R. v. Ward*, 11 Price, 518, which you argued, you will see it was, on petition to the Crown, referred to the Lord Chancellor, who examined into it, and finding it arguable, referred it to the twelve judges, by whom it was heard and counsel assigned to argue it. The same was done in *Fauntleroy's* case. The prisoner, therefore, is not without a remedy if a judge improperly omits, or refuses to reserve a point. The Crown, through the Lord Chancellor, will, on a proper case made, direct the body of the judges to hear the point argued."

Special jury.—Beware how you try before a common jury a cause which, if your attention were pointedly called to the matter, you would see to be one imperatively calling for a special jury. I could mention a number of cases in which the cruellest injustice has been done through trying improperly by a common jury. Pray remember the strength of vulgar prejudices, the jealousy too often existing between different sections of society. By inattention to the point on which I am dwelling, you are practically depriving your client of his right of a trial by his peers.—*Warren's Duties, &c. of Attorneys.*

Salaries of the county court judges.—The salaries of the judges of the County Courts have, by an order in council, being fixed at the annual sum of £1,000 each in lieu of fees, to commence from the 30th of September last. Considerable remonstrance has been made against the lowness of the amount, on the part of the judges. They complain of having been hardly dealt with; but we think £60,000 a-year is quite enough to pay for County courts, and the amount being only £200 short of the extreme limit fixed by Parliament at their creation, the judges have not much reason to complain. True, several of them have, during the first year of their office, been in the receipt of a greater income, derived from the fees which have been taken; but we have every reason to believe that henceforth the County court business will considerably diminish, and that the difference between the salary fixed and the judges' fees will for the future, on the average of the year, not be very disproportioned. As to the additional burdens which have been cast upon them, no one better than the judges themselves must be aware, that they received their appointments from the Lord Chancellor, on the express understanding that they were to consider themselves liable to undertake such further duties as Parliament might impose (9 *Law Mag. N. S.* 258).

NOTES OF RECENT LEADING CASES.

COMMON LAW.

APOTHECARY.—*Practising in London with a country certificate*—*Suing for medicines, &c.*—An apothecary may sue for medicines, &c., supplied to a patient in London; although he has only a certificate of qualification from the Apothecaries Company to practice in England, except the city of London, the 55 Geo. 3, c. 194, s. 19, requiring an additional fee to be paid for a certificate to practice in London, being only a fiscal regulation for the benefit of the company (*Young v. Geiger*, 12 Jurist, 983). *Per* Maule, J.:—"The object of the act is to give certain powers to the Society of Apothecaries, for the purpose of preventing unfit persons from practising as apothecaries. I think, looking at the 14th and 15th sections, it is clear, that a person who has satisfied the court of examiners of his ability and skill to practice as an apothecary, is considered by the act, as competent to practise generally, and that he is entitled to his certificate: and the statute, in my opinion, does not recognise such a thing as a person being competent to practise in one place and not in another. The 19th section says, that £10 10s. shall be paid by every person intending to practise in London, and that no person who has obtained a certificate for the country, shall be entitled to practice within the city of London, or within ten miles thereof, until he shall have paid the additional sum of £4 4s. That, however, is clearly a fiscal regulation for the benefit of the company, which they may waive as they think fit. I think the spirit of the act is in favour of this construction; and the letter of the act does not prevent its being put."

BILL OF EXCHANGE.—*Payment of bill—Re-issuing afterwards.*—By sect. 19 of 55 Geo. 3, c. 184, s. 19, a penalty is inflicted for re-issuing a bill of exchange after it has been paid, and the bill so re-issued is void (see *Lazarus v. Cowell*, 2 Gale and Dav. 407; S. C. 3 Q. B. R. 459). But a bill paid before it is due, may be re-issued without a stamp (*per* *Ellenborough* in *Burbridge v. Manners*, 3 Campbell, 194: recognised in *Morley v. Culverwell*, 7 Mees. and W. 174; S. C. 4 Jur. 1164). There must also be an actual payment, for an arrangement by which the bill is treated as satisfied will not suffice (*Ibid.*). In the late case of *Thomas v. Fenton* (5 Dowl. and Lown. 28; S. C. 2 Bail C. 68; 11 Jur. 633; 16 Law Journ. N. S. Q. B. 362) it was decided, that payment within the 55 Geo. 3, c. 184, s. 19 of a bill of exchange, so as to render it no

Pollock said, "I think the effect of the note is that the defendant promised to pay at a particular place. We must next consider what is the legal effect of such an instrument. The 1 & 2 Geo. 4. c. 78, does not affect promissory notes at all, and therefore they must still be presented at the place where they are made payable, just as they were before the statute. Counsel contended that there was a distinction in this respect between negotiable and non-negotiable instruments, but the case he has cited (*Wain v. Bailey*, 10 Adol. and Ellis. 616), fails to show such a distinction as he has contended for; and I think that where a contract is between the original parties only, it is more reasonable to require a presentment at the place stipulated for by both of them." The plaintiff's counsel further contended, that "at" meant "of" or "living at," but the court were of a totally different opinion, and Mr. B. Alderson observed: "if the plaintiffs think that the word "at" in the note means "of" they ought so to have declared upon it, and raised that question before a jury, who would have had no difficulty in coming to a conclusion upon it."

EQUITY.

FACTOR.—*Advances on furniture—Agent*—"Goods and merchandise."—By 5 & 6 Vict. c. 39, s. 1, an agent entrusted with the possession of goods, or of the documents of title to goods, shall be deemed to be the owner of such goods or documents, so as to give validity, even as against the owner, to any contract or agreement by way of pledge, lien, or security, *bond fide* made by any person with such agent (though there be notice that the party is only an agent) for any original or subsequent advances. By s. 2, a pledge, &c. in consideration of the delivery or transfer to such agent of any other goods, or merchandise, or documents of title, or negotiable security upon which the person so delivering up the same had a valid lien and security for previous advances to such agent, is to be deemed a contract made in consideration of an advance within the meaning of sect. 1; but it is provided, that the lien acquired upon the goods or documents deposited in exchange shall not exceed the value of the goods, merchandise, &c. delivered up or exchanged. It has been held that the act applies to mercantile transactions, and not to the case of advances made upon the security of furniture used in a furnished house, not in the way of trade, to the apparent owner of such furniture, such apparent owner afterwards appearing to be the agent entrusted with the custody of the furniture by the true owner. Such "agent" is not an agent, nor is such furniture "goods and merchandise" within the meaning of the statute 5 & 6 Vict. c. 39 (*Wood v. Rowcliffe*, 6 Hare, 191).

MARRIAGE OF MINOR.—*Forfeiture—Settlement.*—By the 4 Geo. 4, c. 76 it is provided, that where a marriage of a minor has

been procured by a false oath, or knowingly without the consent of the parent or guardian, a court of equity shall, upon the information of the Attorney-General, have power to declare a forfeiture of all interest of any property accruing to any party so offending, by force of such marriage. The act after thus providing for taking from the offending party all property which the law by force of the marriage confers on such party, then directs that such property shall be so settled as to prevent the offending party deriving any benefit from it to the injury of the other parties, viz., the innocent party and the issue of the marriage. Upon this principle, in a late case, a power of disposition by the wife (the husband being the offending party) was inserted in a settlement under the act, such power appearing advantageous to the wife, and being so limited as not to affect the interest of the issue of the marriage (Att. Gen. v. Lucas, 12 Jurist, 1011). The case had been before the Vice-Chancellor, and this was an appeal. The Lord Chancellor said:—"The settlement is to be for the interest of the innocent party, or the issue of the marriage, but the husband is to get nothing. I mean (for I think it the reasonable construction) to the injury of the other parties. Now, would it not be injurious to the wife to say to her, 'You shall not part with any portion of this property.' She, we may suppose, is about to die, and there is no child, no one to provide for but her husband; shall the court say that she may not have a right to give him anything? So far, however, as the rights of children are concerned, the court must take care that no benefit is given to the husband. By a power of appointing absolutely, the wife may deprive the issue. So far, then, as any provision in this settlement could deprive the wife or children of any part of the property to be subject to settlement, the Master has miscarried, and the settlement must be altered. As to the one-third, however, the power of disposing of it is a benefit to the wife. On her becoming a widow, she should have the power to provide for a second marriage, and I do not see that that can be objected to." It was declared, that if the wife survives, she is to have power to appoint one-third by deed to be executed after the coverture has determined, or by will; if the husband survives, the whole is to go to the issue of the marriage. If there is no issue, the wife to have power of appointment by deed or will, the deed to be executed after the determination of the coverture. The Vice-Chancellor's decision will be found in 12 Jur. 534.

REVERSIONARY INTERESTS.—*Disposing of*—*Fair value.*—Courts of equity will relieve persons who, having reversionary interests, have disposed of same for less than their fair value, where that was capable of being estimated, and although it be not shown that undue advantage was otherwise taken of the party's condition (see *Bowtree v. Watson*, 3 Myl. and Ke. 340; *Newton v. Hunt*, 5

Sim. 511; *Edwards v. Browne*, 2 Coll. 100). In the case of *Davies v. Cooper* (5 Myl. and Cr. 270), the purchase of a contingent reversionary interest was set aside, chiefly on the ground of inadequacy of value, the consideration being an annuity for the life of the vendor, whose life was a bad life, and was better known to the purchaser than to the vendor to be such. The question always is, whether or not a fair price was given; if so, and there be no circumstances of fraud or imposition, the sale is binding. The question is not whether the *market* price were given (*Aldborough v. Trye*, 7 Cl. and Fin. 436; S. C. 4 Jur. 1149). In the very recent case of *Sewell v. Walker* (12 Jur. 1041) a married woman sold her contingent reversionary interest in personalty for £76, with an agreement that the expenses of the assignment should be paid out of the purchase money. The interest was valued by an actuary employed by the assignors (but erroneously without reference to the contingency of the wife surviving her husband before the interest was reduced into possession), as an absolute reversion, at £131 5s. 0d. The Vice-Chancellor refused to set aside the sale. V. C. Knight Bruce said: "The subject of contention here is too small for a reference to the Master, and I consider that I am bound to decide the case upon the materials now before me. It would be improper to treat this as a case of oppression or fraud, or to treat it as a case where the consideration was not paid in money, and goods worth the money. There is no rule to prevent the costs of the purchase-deed being borne by the vendor. The question is then reduced to one of under-value, upon which one ought not to be too strict. Now the actual value suggested by the actuary is £131 for the absolute reversion. When, in addition to this, there was not before the actuary the fact, which should be added to the necessary deduction, that the husband might die during the lives of the tenant for life and the wife, it would be too much to interfere."

CONVEYANCING.

COPYHOLD.—*Mandamus to inspect court rolls*—*Affidavit to admit claimant.*—The rolls of a manor are open to the inspection of the lord and the copyholders, but not of strangers. In Archbold's Pract. by Chitty (p. 1248, 8th edit.) it is laid down, that a person who has a *prima facie* title to a copyhold, is entitled to inspect the rolls, and take copies of them, so far as relates to the copyhold claimed, although at the time no cause be depending respecting it (*R. v. Lucas*, 10 East, 235). In a late case it was held, that where a claimant to copyhold property comes to the court for a *mandamus* to the steward of the manor, to compel him to grant inspection of the court rolls and admit the claimant as a copyholder of the manor to enable him to try his right to the property he claims, he

great respect to this decision ; but in the very next volume there is a case of *Moore v. Choat* (8 Sim. 508), in which the same relief was prayed, and here, I find, the Vice-Chancellor of England, most properly as I think, not only disclaimed the doctrine of that decision, but expressed surprise that it was made. The only observation that I feel inclined to make is, that the Vice-Chancellor seemed to think he could deal with the case before him consistently with *Lucas v. Comerford* (3 Bro. C. C. 166) but I can see no distinction between the cases in principle. That case shows that the decision in *Flight v. Bentley* was not right, and establishes that no such equity exists as that upon which that case proceeded. Another case was referred to before the Master of the Rolls, of *Close v. Wilberforce* (1 Beav. 112). That case was between the lessee and equitable assignee of a lease, and not between the lessor and assignee. It was a question between parties who were privies : the plaintiff's case was, that as between the assignee and the lessor the assignee was the owner of the lease ; that the plaintiff had been called on to make good the liabilities of the assignee, and was entitled to be indemnified. Under these circumstances, and seeing the state of the authorities—a decree of Lord Thurlow never followed, and, although adopted by the Vice-Chancellor, subsequently repudiated—the only question is, whether I am bound, at this period, to act on the decree of Lord Thurlow, when it appears to me objectionable. I feel that I cannot do so, and that I should be for the first time, making a decree following that of Lord Thurlow."

NEW COUNTY COURTS.

The new County Courts are now beginning to afford a goodly crop of decisions in the superior courts, and we now, therefore, confine ourselves in this number to them. In our next we shall notice some of the decisions in the new courts.

Splitting demands—"Cause of action."—The 63rd section of the Small Debts' Act, 9 & 10 Vict. c. 95, enacts, "that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said courts : held, that the term "cause of action" meant "cause of one action," and was not limited to an action on one separate contract. In the case of tradesmen's bills, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one demand, such demand, if it exceeds £20,

of objection.—The defendant was sued in the county court, and the plaintiff obtained judgment, the cause not being tried by a jury. Subsequently the defendant moved for a new trial, and at the same time required that it should be tried before a jury. These applications were resisted by the plaintiff. The judge, however, granted the application in both respects on certain terms, *inter alia*, that the defendant should pay a certain sum to the plaintiff for the costs of the application; this sum being paid to the plaintiff, a new trial was had, when the jury returned a verdict for the defendant. Upon an application for a rule nisi for a writ of mandamus, commanding the judge to give effect to the judgment pronounced by him on the first trial, on the ground that he had no function upon an application for a new trial, to direct that the case should be tried by a jury: held, that the plaintiff by accepting the costs of the application for a new trial, had waived his right to object to the second trial (*Sparrowe v. Reed*, 2 Bail C. 240).

Claim of title to land under sect. 58—Prohibition.—Where a claim is set up under sect. 58, a mere statement, though on oath, by the party claiming, unsupported by other evidence, is not sufficient to oust the court of its jurisdiction. If such a claim be set up, the judge is at liberty to enquire and decide whether the title really is in question. His decision, however, is not final; for if, on application to the superior court, it should appear that the title did come in question, a writ of prohibition would be granted (*Lilley v. Harvey*, 12 Jur. 1026). There Mr. Justice Wightman said: "Where there are special pleadings, and the question is raised upon them, the judge can go no further, but where the question is not raised upon the pleadings, but is merely suggested by the defendant, the judge must enquire into the circumstances before he can be satisfied that title does come in question. If he is wrong, and assumes jurisdiction where the title really is in question, the defendant, upon making that appear to the superior court, would be entitled to a prohibition."

Certiorari to remove cause.—An application for a *certiorari* to remove a cause from a county court should be made to a judge at chambers, and not to the court in the first instance. If there be a difficulty the judge may refer the case to the court (*exp. Bowen*, 12 Jur. 964). The *certiorari* may issue *ex parte* and without notice to the other party, if the judge thinks proper (*Symonds v. Dimsdale*, 17 Law Journ., N. S., Ex. 247).

Attorney suing and being sued.—It has been decided that attorneys' plaintiffs are not bound to sue in the county courts (*Lewis v. Hance*, 17 Law Journ., N. S., Exch. 163; S. C. 12 Jur. 375; *Jones v. Brown*, 17 Law Journ., N. S., Exch. 163). They are, however, liable to be sued therein (*Jefferies v. Beart*, 12 Jur. 1003, on London Act).

in *Hayter v. Fish*, 12 Jur. 1004). This would seem to be a just view, particularly as it is open to the plaintiff to traverse the suggestion when entered.

Form of affidavit to enter suggestion.—The following form of affidavit (the title of the court and of the cause being inserted) will be found useful. We have altered it from a form in the *Jurist*:—

John Jones, the above-named defendant, maketh oath and saith that this action is a plea of personal action, founded on contract, wherein the debt claimed by the plaintiff was not, nor is more than £20, but only £—, and that this action was commenced in this honourable court, on the — day of —, A. D., 184—, and a verdict was found herein for the plaintiff for the sum of £—, and no more, but judgment thereon has not yet been signed (or, if signed, state when, and whether for costs as well as the debt, and whether under a certificate for speedy execution, or on a trial before the sheriff). And this deponent further saith, that before and at the time of this action, a county court for the recovery of debts and demands under and according to the provisions of the act of Parliament, made and passed in a session of Parliament, holden in ninth and tenth years of the reign of her present majesty Queen Victoria, intituled "An act for the more easy recovery of small debts and demands in England," had been and was established, constituted, and holden in and for the district of —, in the county of —, under, by, and according to the said act of Parliament. And this deponent further saith, that before and at the time of the commencement of this action, the defendant dwelt at —, within the said district —, in the said county of —, and within the said jurisdiction of the said county court, and that the cause of action for and in respect of which this action was brought, arose wholly (or in a material point, that is to say, &c., state in what respect) within the jurisdiction of the said county court, and that a plaint might have been entered in the said county court for the said cause of action. And this deponent further saith, that at the time of the commencement of this action, the plaintiff did not dwell more than twenty miles from the defendant, and that neither the plaintiff nor the defendant at the time of the commencement of this action was an officer of the said county court.

Attorney's charge for trial, &c.—It has been decided by Mr. Justice Patteson in *re Green* (12 Jur. 1044), that an attorney is not entitled for his costs to more than the amount specified in sect. 91 of the act, even as against his own client, and that the amount includes everything that is done by the attorney in regard to a suit in the county court, whether before or at or after the hearing.

CONTRACTS IN RESTRAINT OF TRADE.

There have lately been many cases decided on the subject of contracts in restraint of trade, some of which we propose to notice, as forming a practical part of the doctrines of covenants. It is true, that agreements not to trade may be made by mere writing, but they are more usually under seal.

It is a clear rule of law, that a covenant or agreement in total or general restraint of trade is void (*Mitchell v. Reynolds*, 1 P. Will. 181; *Selw. N. P.* 567, 11 edit.; 27 *Law Mag.* 214; 1 *Story's Eq. Jurisprud.* 236; *Princ. Com. Law*, 53—55). And this is so, though the agreement be supported by a consideration. In fact nothing can be made to make a total restraint of trade good, because, as we shall presently show, it is not the interests of the parties to the contract only which are affected, but those of the public generally. A partial restraint of trade is good, if supported by a consideration, and the restraint be only a reasonable one (see 5 *Com. Dig.* tit. "Trade," D. 3; *Chesman v. Nainby*, 2 *Strange*, 739; *S. C.* 3 *Bro. P. C.* 349; *Rannie v. Irvine*, 7 *Man. and Gr.* 969; *S. C.* 8 *Scott, N. R.* 674; 14 *Law Journ. N. S. C. P.* 10; 8 *Jur.* 1051; *Pilkington v. Scott* 15 *Mees. and W.* 657; *S. C.* 15 *Law Journ. N. S. Exch.* 329; *Nicholls v. Stretton*, 11 *Jur.* 1009). But even a partial restraint is not good unless it be reasonable under the circumstances of each case, and be supported by a consideration. We may remark, that it is clearly settled now, that where a consideration appears in a deed, the court will not enter into the question whether the consideration be equal or not in value to the restraint agreed on (*Hitchcock v. Coker*, 6 *Adol. and Ellis*, 438; *S. C.* 1 *Nev. and P.* 798). As to whether the restraint be or be not reasonable, each case must depend upon its own circumstances, for there are no certain or precise rules by which this can be ascertained. The question of reasonableness or not is one for the court.

Consideration for restraint.—It is to be remarked, that no express consideration is required to be shown for the restraint on trading, where, as is usually the case, such stipulation arises out of a contemporaneous transaction supported by a consideration. Thus, this stipulation usually arises out of the sale of a trade, or the goodwill thereof, for which a consideration is paid, and then the contract of the vendor not to carry on the same trade within that place, or within a certain reasonable limit, is in fact part of the bargain, and founded on the same consideration (see *Mallan v. May*, 11 *Mees. and W.* 653, 666; *Hitchcock v. Coker*, 6 *Ad. and Ell.* 438). Besides the

instance here put, there are the cases of a clerk to an attorney, &c., or assistant to a tradesman or manufacturer, or where a partner gives up his interest to his companion, and covenants that he will not use or carry on such trade or profession within certain limits, and lastly, where two or more persons entering into partnership mutually agree, that none of them shall, during the partnership, be engaged in any other trade or business. In all these instances, there are a *bona fides* and value to which the contract operating in restraint of trade attaches. In such cases, therefore, there will be found to be a substantial consideration to justify the restraint, at least to some extent. The consideration is that of the principal transaction, which it may be fairly said would not have been entered into, except for the restriction, or at any rate, not on the terms stated in the agreement. No one would give the same consideration for the purchase of a business where the seller was to be at liberty to set up again as soon and as near the old place as he pleased. The clause of restraint merely operates to give a security that the principal contract will be fairly and fully carried out. We may then conclude, that whenever a consideration exists in respect of the principal transaction, there will be a sufficient consideration to support the restraint. But sometimes it happens that each description of contract before enumerated exists without a substantial consideration appearing, for a party may relinquish a business in favour of another without any consideration paid; so a clerk or assistant may be engaged without receiving any salary; and so a partner may retire from a partnership without receiving any consideration for such retirement. In such cases, the covenant not to trade would appear to be without consideration, and therefore, not binding, unless the restraint were very reasonable. But in fact it seldom happens in these cases, but that some kind of consideration, sufficient to support the contract appears, for when a man relinquishes a business in favour of another, the latter usually covenants to pay the debts; when a partner retires he is indemnified against the debts; and the clerk or assistant is to receive a salary. In all these cases, a sufficient consideration would appear to support the restraint. As to the case of the clerk or assistant, supposing no salary were given him, yet if in fact there be an engagement to instruct him, that will support the restraint (see *Nicholls v. Stretton*, 7 Beav. 42; S. C. at Law, 11 Jur. 1009). With respect to the adequacy of the consideration, where it is an engagement to serve as a clerk or servant, and the agreement is, not to work for any other person during a certain term, some cases will presently be mentioned.

Consideration appearing in agreement.—We have before said, that though the contract be under seal, yet some consideration must appear for the agreement in partial restraint of trade. This may, at

assistant in the same trade to any others within the limited district. Where the limit is general and indefinite as to time, it will be important, as we have seen, to look at the restriction as to the extent of district, in order to form a judgment as to the reasonableness of the restriction. So we have seen, that if the restriction extend throughout the kingdom, and to every mode of carrying on the business it is void, even though the time be limited; and even if the restriction do not extend to every part of the kingdom, yet if it be unreasonable, having regard to the particular business, if it extend to all modes of carrying on the business, it is void. There may be no qualification as to place, yet if it apply only to certain modes of carrying on the business, as for example, except as an assistant, and the party is thus at liberty to carry on the particular trade in some other form, namely, as a master, the contract is a valid one, for the restriction is not an absolute one, but permits the party to carry on the trade in any other mode than that stipulated against. Such an agreement is valid though the restriction be unlimited as to time and place, if there be a sufficient consideration. The following cases will illustrate these remarks, namely, *Wallis v. Day*, 2 Mees. and W. 273; S. C. 1 Jur. 73; *Nicholls v. Stretton*, 7 Beav. 42; S. C. at Law, 11 Jur. 1009; *Pilkington v. Scott*, 15 Mees. and W. 657; S. C. 15 Law Journ., N. S. Exch. 329. In the case of *Wallis v. Day*, it appeared that the plaintiff, by deed, sold to the defendants his business as a carrier between London and Wisbeach, and in consideration of the covenants therein contained, on the defendants part, covenanted with them that he would not thenceforth during his life, exercise the trade of a carrier, except as thereafter mentioned; and that he would thenceforth, during his life, faithfully serve the defendants as an assistant in the trade of a carrier; and the defendants in consideration of the before-mentioned covenants, and the plaintiff's faithful service as aforesaid, covenanted to pay him a certain weekly sum for his life. In an action against the defendants on this covenant, it was held the plaintiff's covenant to serve during his life was good, and that the covenant in restraint of his trade was not void, inasmuch as he was not absolutely restrained from carrying on the trade, but only from carrying it on in any other way than as an assistant to the defendants.

Separating contract. — A covenant which is void and illegal in part, as being an unreasonable restraint of trade, may be valid as to another part which provides for a restraint not unreasonable. This was so decided in *Green v. Price* (13 Mees. and W. 695; S. C. 14 Law Journ., N. S. Ex. 105; 9 Jur. 857, and in the Exchequer Chamber, 16 Mees. and W. 346; S. C. 16 Law Journ., N. S. Ex. 108). In that case the defendant for valuable consideration, covenanted not to exercise certain trades during his life, within the cities

Howe, 3 Beav. 383; Hitchcock v. Coker, 6 Adol. and Ellis, 438; Rannie v. Irvine, 8 Scott, N. S. 674 (stated *supra*); Green v. Price, 13 Mee. and W. 695; S. C. 14 Law Journ., N. S. Exch. 105; 9 Jur. 857; S. C., in error, 13 Mee. and W. 695; 9 Jur. 880. There are other cases either before mentioned or referred to in the cases just mentioned. These cases will fully support the proposition before enunciated, namely, that when the carrying on a trade is restricted generally as to space, and extends to all modes, the restriction is unreasonable, though confined to a very short period of time, as for even less than a year. It is the same, though the restriction be to a certain space, if that district be not a reasonable one, and all modes of carrying on the trade or business be restrained. Though, as before stated, the restriction as to time is unimportant, if the agreement be otherwise legal, yet the direction as to time may be important in complex cases, where there is any doubt as to the legality of the other provisions. Bunn v. Guy, Whittaker v. Howe.

We will notice some of the cases above cited. In Bunn v. Guy, an agreement was entered into by a practising attorney in London, to relinquish his business and recommend his clients to two other attorneys, and that he would not himself practice in such business within London and one hundred and fifty miles therefrom, and that he would permit them to make use of his name in their firm for one year. This was held to be a valid agreement, and that, though the restriction was indefinite as to time. In Whittaker v. Howe, the defendant, an attorney, agreed not to practise as a solicitor, &c., in *any part of Great Britain* for twenty years, and the Master of the Rolls held the agreement valid. It seems difficult to maintain the correctness of this decision, and it is remarkable, that it is the only case in which a restraint extending throughout the whole of England has been held valid. The principle of this decision must be taken to be, that from the nature of the business the Master of the Rolls thought it necessary in applying the admitted rule, that the restriction is co-extensive with the required protection, that the restraint for such a purpose must be throughout the kingdom. We must suppose that the court referred to the extent of business and the nature of the connection in the particular case; at any rate, it is clearly not supportable on any other supposition, even if it be on that. In the case of Horner v. Graves, (7 Bing. 743), Tindal, C. J. says: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the

party, can be of no benefit to either ; it can only be oppressive ; and if oppressive, it is, in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void, on the ground of public policy."

Hitchcock v. Coker. — This was an action of assumpsit. The declaration stated that before and at the time of the promise, plaintiff was a druggist, and had taken defendant into his service as an assistant at an annual salary, on condition (amongst other things, that the defendant should enter into and perform the agreement after mentioned), that defendant, in consideration of the premises, and in the performance of the condition by an agreement reciting as above, agreed with plaintiff, that if defendant should at any time thereafter exercise the trade or business of a chemist or druggist in the town of T., or within three miles thereof, defendant should pay plaintiff £500 as liquidated damages. It was held by the court, first, that there was a legal consideration for the contract ; secondly, that the court could not enter into the question, whether the consideration was equal in value to the restraint agreed on by the defendant ; and thirdly, that the restraint was not shown to be unreasonable or oppressive, by the circumstance that its duration was not limited to the life of the plaintiff, or to the time during which he should carry on the business.

Mallan v. May. — There A. B. agreed, by articles under seal, to enter the service of C. D., as assistant to him in his business of surgeon-dentist, for a period of four years : and the agreement contained a covenant, that after the expiration of that term, A. B. would not, without the consent in writing of the other, carry on the business of a surgeon-dentist in London, or any of the towns or places in England or Scotland where C. D., or A. B. on his account, might have been practising before the expiration of the above service; held, first, that this covenant, so far as it related to London, was not, but that, as to its other provisions, it was void, as imposing an unreasonable restraint of trade ; and, secondly, that the covenant was divisible, so that the illegality of the second branch did not vitiate the whole (see as to the construction to be put on "London," the same case on case out of equity, reported 13 Mees. and Wels. 511 ; S. C. 14 Law Journ. N. S. Exch. 48 ; 9 Jurist, 19). It was also held in the first case of *Mallan v. May* (and this is the principle of all the cases), that all restraints of trade, which are larger than are necessary for the protection of the party with whom the contract is made, are unreasonable, and void as against public policy ; and that whether a contract in restraint of trade be reasonable or not, is a question of law to be determined by the judge, and not a matter of fact to be left to a jury. In the same case it was said (seemingly) that, in estimating the reasonableness of a contract not to exercise a

trade or profession within a particular district, the populousness of the district is not to be taken into account.

Nicholls v. Stretton.—In this case the declaration in covenant on an indenture, which, after reciting that defendant had for four years been plaintiff's salaried clerk, and requested plaintiff to accept him as articulated clerk without payment of any premium, which plaintiff consented to do on defendant entering into the covenants thereafter contained, and that defendant had bound himself clerk to plaintiff for five years, to the intent that he might become entitled to make application to be admitted attorney and solicitor; stated that the defendant covenanted that he would not, during the said term of five years, nor at any time after the expiration of such term, either directly or indirectly, interfere or intermeddle with, or be concerned as attorney, agent, or otherwise, for any person who had already been, or should thereafter become or be, the client or correspondent in business of or with plaintiff or any partner he might admit to a share with him, or any person to whom he might sell or assign the whole or any part of his business or profession; and that defendant would not act as partner, clerk, or assistant with, or to any person who should interfere or intermeddle as aforesaid; and in case defendant should commit any breach of his said covenants, he should forfeit £100 for every such breach: held, that the covenant was divisible, and that an action was maintainable against the defendant for being concerned as attorney for persons who were clients of the plaintiff at the date of the deed. The court held that the decision in *Green v. Price* ruled the present case. It should be stated that this case came out of equity, which had directed a case for the judges at common law. In equity (see report in 7 Beav. 42) the court had granted an injunction to restrain the clerk, after the expiration of his articles, from acting for persons who had been clients of the master during the articles, and this, though it appeared by the articles of clerkship that there was a stipulation that the master might put an end to the period of the articles at any time upon one week's notice. It will thus be seen that the above decisions get rid of the difficulty which might arise as to the covenant being too extensive.

RECENT STATUTES (11 & 12 VICTORIE)

[Continued from p. 15.]

Game Certificates—Killing Hares—Justices of the Peace Performance of Duties' Act—Indictable Offences—Warrant and Summons—Backing Warrants—Court, &c.—Remanding Prisoner—Witnesses—Prisoner's defence—Discharge—Commitment—Binding over to Prosecute—Bail—Certifying Bailment and Depositions—Copy Examinations—Repeal of Statutes—Justices of the Peace Performance of Duties' Act—Summary Convictions and Orders—Information—Summons and Warrant—The Justices and Court—Witnesses—Non Appearance—Hearing on Appearance—Adjournment—Convictions—Dismissal Certificate—Costs—Distress Warrant—Backing—Commitment to Prison—Repeal of Statutes—Discharge of Bankrupt from Custody—Poor Irremovable Amendment Act.

Game certificates.—Killing hares. CHAP. 29.—We are obliged to a correspondent (J. E. G. B.) for the following correction in our statement (p. 15) of this act: "I perceive in your report of Recent Statutes (p. 15), under 11 and 12 Vict. c. 29, s. 2, you state the authority is to be 'sent to the clerk of the peace, who is to register same.' The words of the section are—'That he shall deliver the said authority, or a copy thereof, or cause the same to be delivered, to the clerk of the magistrates acting for the petty sessions division within which the said lands are situate, who shall forthwith register the same.'"

Justices of the Peace Performance of Duties' Act.—Indictable offences CHAP. 42.—This statute and the following one make a great alteration in the procedure before justices of the peace, both with regard to indictable offences and summary convictions. It is, of course, impossible that we can give these statutes at length, or even notice all their regulations, but we trust that the following analysis of them will be found to present a useful summary of their provisions. We shall first notice the act (CHAP. 42) relating to prisoners charged with indictable offences.

Warrant and summons.—A justice of the peace may issue a warrant to apprehend a person accused of treason, felony, of offences on the high seas or abroad, or any other indictable offence; and, if properly penned, it will indemnify the officer who executes it. Where the offence was not of a serious nature, it was even formerly usual to issue

a summons merely in the first instance; and now the magistrate may, if he please, issue a summons in all cases in the first instance. If the summons be not obeyed, a warrant may issue. In the case of a summons issuing, the information or complaint may be by word of mouth merely, without any oath to substantiate it. The summons must be served by a constable on the defendant personally, or by leaving the same for him with some one at his last or most usual place of abode. By s. 3 a warrant may issue to apprehend a party against whom an indictment is found. If a person indicted be already in prison for some other offence, a justice may order him to be detained until removed by writ of habeas. By sect. 4, warrants may, in certain cases, be issued on a Sunday. Sect. 10 relates to form and execution of warrant, and provides that no objection is to be allowed for an alleged defect in the form of the warrant, &c.

Backing warrants.—Formerly there ought to have been a fresh warrant for every county; but the practice of backing warrants had long prevailed without law, and was at last authorised by the 23 Geo. 2, c. 26, and 24 Geo. 2, c. 55. By the 13 Geo. 3, c. 31, and 54 Geo. 3, c. 186 (now repealed by the present act), and other acts, provisions were made as to the apprehension of offenders who have gone from one part of the United Kingdom to another; and by 6 & 7 Vict. c. 34, as to the apprehension in the United Kingdom of persons committing treason or felony out of the United Kingdom, and *vice versa*. But now, by the act we are noticing, complete regulations are made for the backing of warrants. By s. 11, where the defendant is not within the jurisdiction of the justice issuing the warrant (in England or Wales), a justice for the county or place where he shall be, or be supposed or suspected to be, shall, on oath of signature to the original warrant, sign an endorsement thereon, authorising the execution of the warrant within his jurisdiction. By s. 12, English warrants may be backed in Ireland, and *vice versa*. By s. 13, English warrants may be backed in the Isles of Man, Guernsey, Jersey, Alderney, and Sark, and *vice versa*. By s. 14, English warrants may be backed in Scotland. By s. 15, Scotch warrants may be backed in England or Ireland.

Court, &c.—By s. 5, justices for adjoining counties, &c., may act as such for one county, &c., while residing in another. By s. 6, justices for a county, &c., may act for it in an adjoining city or place of exclusive jurisdiction, but this is not to extend to give power to act in any matter arising therein. Sect. 7 relates to the powers given to justices by 2 & 3 Vict. c. 82, in detached parts of counties. By s. 19, the place where the examinations are taken is not to be deemed an open court, and no person is to remain without the consent of the justice. By ss. 29 and 30, one London, metropolitan, or stipendiary magistrate may act alone. If a person be apprehended in one county

for trial. Sect. 26 regulates the conveyance of prisoners to gaol, and the payment of the expenses of such conveyance.

Binding over to prosecute.—By sect. 20, the prosecutor and witnesses are to be bound by recognisance to appear at the next court of oyer and terminer, or gaol delivery, or court of general or quarter sessions. The recognisance, depositions, &c., are to be transmitted to the court in which the trial is to be had. A notice of such recognisance is forthwith delivered to the party entering into the same. Witnesses who refuse to enter into recognisances may be committed.

Bail.—By sect. 23, where the accused is charged with a felony, or with an assault with intent to commit a felony, or with an attempt to commit a felony, or with obtaining or attempting to obtain property by false pretences, or with a misdemeanor in receiving property stolen, or obtained by false pretences, or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent exposure of the person, or with riot, or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace officer in the execution of his duty, or upon any person assisting in his aid, or with neglect or breach of duty as a peace officer, or with any misdemeanor for the prosecution of which the costs may be allowed out of the county rate, the justice may, in his discretion, admit such person to bail, upon his procuring and producing such surety or sureties as in the opinion of such justice will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence; and thereupon the justice shall take the recognisance of the said accused person and his surety or sureties, conditioned for the appearance of such accused person at the time and place of trial, and that he will then surrender and take his trial, and not depart the court without leave. And the justice may admit to bail in the like cases after commitment for trial, in which case (s. 24) a writ of deliverance is to be sent to him if not detained for any other offence. In the cases of other indictable misdemeanors the justice has no discretion, but must admit the accused to bail. But no justice is to admit any person to bail who is charged with treason, which can only be done by order of one of the Secretaries of State, or by the Court of Queen's Bench, or a judge thereof in vacation. We may observe that it is clearly settled that the Court of Queen's Bench (or any judge thereof in the time of vacation) may bail for any crime whatsoever, be it treason, murder, or any other offence, according to the circumstances of the case.

Certifying bailment and depositions.—*Copy examinations.*—Upon bail being accepted, the magistrate must certify the bailment in writing, and with all examinations and informations, and deliver the same to the proper officer of the court in which the trial is to be had. By sect. 27, a prisoner may, after his final examination, and before the

first day of the assizes or sessions, &c., at which he is to be tried, have, on paying at the rate of three-halfpence for same, for each folio of ninety words, a copy of the examination before the magistrate.

The act applies to England, Wales, and Berwick-upon-Tweed, but not to Scotland, Ireland, or the Channel Islands, except as to backing warrants.

Repeal of statutes.—The following acts and parts of acts are by s. 34 repealed, namely, 13 Geo. 3, c. 31; 28 Geo. 3, c. 49; 44 Geo. 3, c. 92; 45 Geo. 3, c. 92; 54 Geo. 3, c. 186; 1 & 2 Geo. 4, c. 63; 3 Geo. 4, c. 46; 7 Geo. 4, c. 38; 7 Geo. 4, c. 64; 5 & 6 Will. 4, c. 33; 6 & 7 Will. 4, c. 114.

Justice of the Peace Performance of Duties' Act.—*Summary convictions and orders.* CHAP. 43.—The preceding act relates to proceedings before justices of the peace on indictable charges; the present act (chap. 43) relates to proceedings before justices on summary convictions and orders. It must be borne in mind that the act does not apply to any order for the removal of a pauper, nor to orders respecting lunatics, nor to informations relating to the excise or customs, stamps, taxes, or Post-office; nor to bastardy orders, except as to backing warrants, &c.; nor to young children in factories.

Information.—The first proceeding is an information or complaint. The information must (s. 10) be in writing, but the complaint whereon the order is sought need not be so (s. 8), unless the particular act of Parliament requires it. No oath is required in making a complaint or laying an information, except where expressly so required, and except where a warrant is to issue in the first instance. By s. 11, the complaint or information must be laid within six calendar months, unless otherwise expressly provided. Provisions are made (s. 4) for the description of the ownership of property, in cases of particular owners, namely, of the property of partners, of counties, in goods provided for the poor, in materials for parish and turnpike roads, and of the property of commissioners of sewers. No variance between the information and the evidence is material; but if the defendant be deceived thereby, the hearing may be adjourned, defendant being committed, or giving recognisance to appear again.

Summons and warrant.—After the information is laid, or complaint made, a summons (s. 1) issues, which must be served on the accused. If the defendant do not appear thereto, a warrant (s. 2) for his arrest may issue; and, indeed, where the information is laid, and the same is substantiated by oath, the justice may issue a warrant in the first instance. The warrant may be backed as provided by 11 & 12 Vic. c. 42, stated above. Sect. 3 regulates the form of warrant and its execution. No objection is to be allowed for want of form in the warrant, or for any variance, &c.; but if the party charged is deceived by the variation, he may be committed or discharged upon recogni-

sance ; if he fail to appear, the justice may transmit the recognisance to the clerk of the peace.

The justices and court.—The hearing takes place before one or two justices, according as the particular statute requires ; but if there be no regulation as to this, then (s. 12) the complaint or information “ may be heard, tried, determined, and adjudged by any one justice of the peace for the county, riding, division, liberty, city, borough, or place where the matter of such information shall have arisen.” The place where the justice sits is to be deemed an open court. There are provisions (ss. 33, 34) as to one London, metropolitan, or stipendiary magistrate acting alone. One justice alone (s. 29) may issue the summons or warrant, even where there must be two justices present at the hearing ; and so one justice may, in such case, issue warrants of distress or commitment, and though he did not hear the case. By s. 6, the provisions of the preceding act (chap. 42) as to justices in one county, &c., acting for another, are to extend to the present act.

Witnesses.—By s. 15, the prosecutor of the information, not having any pecuniary interest in the result, and every complainant, though interested, may be witnesses. The witnesses must be sworn. By s. 7, if it be sworn, on oath, that a witness will not voluntarily attend, the justice may issue a summons requiring his appearance, and if he still neglect, a warrant may issue. Indeed, if it be sworn that it is probable a witness will not attend, the justice may, in the first instance, issue a warrant for his apprehension.

Non-appearance.—By s. 13, if the defendant does not appear, the justice may proceed to hear and determine the case in his absence, or may issue warrant, and adjourn the hearing till defendant is apprehended. If the defendant appear, and the complainant, &c., does not, the justice may dismiss the complaint, &c., or, at his discretion, adjourn the hearing, and commit the defendant or discharge him upon recognisances ; and if he fail to re-appear, the justice may transmit the recognisance to the clerk of the peace.

Hearing on appearance.—If both parties appear, the justice is then (s. 13) to proceed to hear and determine the case. By s. 14, where the defendant is present at the hearing, the substance of the information or complaint must be stated to him, and he must be asked if he have any cause to show why he should not be convicted, or why an order should not be made against him ; and if he admit the truth of the charge, and show no sufficient cause, then the justice may convict him or make an order against him accordingly ; but if he do not admit the truth of the charge, then the justice may proceed to hear the complainant and his witnesses, and also to hear the defendant and his witnesses, and also to hear such witnesses as the complainant may examine in reply, if such defendant shall have examined any witnesses or given any evidence other than as to his (the defendant's) general

character; but the complainant is not entitled to make any observations in reply upon the evidence given by the defendant, nor is the defendant entitled to make any observations in reply upon the evidence given by the complainant in reply. The justice having heard each party and the witnesses and evidence, may convict or make an order upon the defendant, or dismiss the information or complaint, as the case may be.

Adjournment.—By s. 16, the justice may adjourn the hearing of cases, and commit the defendant, or suffer him to go at large, or discharge him upon a recognisance, with or without sureties, which recognisance, in case of non-appearance, is forfeited.

Convictions.—By s. 17, the form of a conviction or order is to be as given in the statute, except where a future statute shall give a different form. It is to be lodged with the clerk of the peace, and to be filed among the records of the general quarter sessions of the peace.

Dismissal certificate.—If the justice dismisses such information or complaint, he must make an order of dismissal of the same, and give the defendant a certificate thereof, which certificate, without further proof, shall be a bar to any subsequent information or complaint for the same matters respectively against the same party.

Costs.—By s. 18, power is given to the justice to award costs, which shall be specified in conviction or order of dismissal, and may be recovered by distress: if nothing be obtained, the party may be committed to gaol for one month, to be reckoned distinctly from any other commitment (ss. 24, 26). Sect. 27 provides for the recovery of the costs of an appeal.

Distress Warrant.—Backing.—By s. 19, where a conviction adjudges a pecuniary penalty or compensation to be paid, or where an order requires the payment of a sum of money, and by the statute authorising such conviction, or order such penalty, &c., is to be levied upon the goods and chattels of the defendant by distress and sale thereof, and also in cases where by the statute in that behalf no mode of raising or levying such penalty, &c., or of enforcing the payment of the same, is provided, the justice making such conviction or order, or any justice of the peace for the same county, &c., may issue his warrant of distress for the purpose of levying the same, which warrant of distress shall be in writing under the hand and seal of the justice making the same. If a sufficient distress shall not be found within the limits of the jurisdiction of the justice granting such warrant, then, upon proof alone being made on oath of the handwriting of the justice granting such warrant before any justice of any other county or place, such justice of such other county or place shall thereupon make an indorsement on such warrant, signed with his hand, authorising the execution of such warrant within the limits of his

jurisdiction, by virtue of which said warrant and indorsement the penalty or sum aforesaid, and costs, or so much thereof as may not have been before levied or paid, shall and may be levied by the person bringing such warrant, or by the person or persons to whom such warrant was originally directed, or by any constable or other peace officer of such last-mentioned county or place, by distress and sale of the goods and chattels of the defendant in such other county or place.

Commitment to prison.—By s. 19, where the issuing a warrant would be ruinous to defendant, or where there are no goods, the justice may commit him to prison; and this may be done (s. 21) where the distress is not sufficient. So, by s. 22, in all cases of penalties, convictions, or orders, where the statute provides no remedy in default of distress, the justice may commit the defendant to prison; and by s. 23, power is given to the justice to order commitment in the first instance for non-payment of a penalty or of a sum ordered to be paid, where the statute directs imprisonment in default of payment. And by s. 24, the justice may order commitment where the conviction is not for a penalty, nor the order for payment of money, and the punishment is by imprisonment. By s. 25, imprisonment for a subsequent offence is to commence at the expiration of that for previous offences. By s. 27, after an unsuccessful appeal against a conviction or order, a justice may issue warrants of distress for the execution of the same.

This act (like the preceding one) applies to England, Wales, and Berwick-upon-Tweed, but not to Scotland, Ireland, or the Channel Islands, except as to backing warrants.

Repeal of statutes.—The following acts and parts of acts are repealed by s. 36: 18 Eliz. c. 5, s. 1, in part; 31 Eliz. c. 5, s. 5, in part; 27 Geo. 2, c. 20, ss. 1 and 2; 18 Geo. 3, c. 19, ss. 1, 2, 3, 5; 38 Geo. 3, c. 55, s. 3; 3 Geo. 4, c. 23; 5 Geo. 4, c. 18; 6 & 7 Will. 4, c. 114, s. 2.

Discharge of bankrupt from custody. CHAP. 86.—This statute mitigates the condition of a bankrupt by enabling the commissioner to discharge him from custody on his surrendering and obtaining protection, and so where his certificate has been refused, or his examination adjourned *sine die*, the commissioner may order his discharge after a certain time where he is in execution at the suit of a creditor who might have proved under the fiat. By s. 1, where any person has been adjudged a bankrupt, and has surrendered to his fiat, and obtained his protection from arrest, pursuant to the practice in bankruptcy, if such person shall be in prison for debt at the time of his obtaining such protection, any commissioner acting under such fiat may order his immediate release from prison, either absolutely or upon such condition as such commissioner shall think fit: provided always that such release shall in nowise affect any rights of the creditor at whose suit he may be in prison against the debtor, except the right

of detaining him in prison, whilst protected from imprisonment by order of the Court of Bankruptcy. By s. 2, if any bankrupt whose last examination shall have been adjourned *sine die*, or whose certificate shall have been suspended or refused, shall be in execution, or be taken in execution, under a *capias ad satisfaciendum* at the suit of any creditor who might have proved under the fiat, and detained in prison, any commissioner acting under his fiat may order his release after he shall have undergone such term of imprisonment, not exceeding two years, as to such commissioner may seem a sufficient punishment for such offences as he may appear, to such commissioner, to be guilty of.

Poor Irremovable Amendment Act. CHAP. 3.—This statute amends the proviso in 9 & 10 Vic. c. 66 (noticed *Abr. Magistrates', &c.*, Cases, p. 7), and will be stated in next number.

MISCELLANEA.

County courts—Costs—Suggestion after judgment.—Where a rule was obtained to enter a suggestion on the roll to deprive the plaintiff of costs under the County Courts' Act, and it appeared that judgment was enforced for the debt, leaving a blank space to be filled up with the amount of the costs, the court held that the rule should have been to set aside the judgment, and not to enter a suggestion. There being a judgment, the court said no suggestion could be entered (*Soames v. Cooper*, 37 L. Obs. 154). The motion to enter suggestion should always be prior to judgment (*Chitty Arch. Pract.* 1403, 8th edit.).

Solicitors practising in bankruptcy.—We deem it important that the question which has been raised by a member of the bar, relative to the right of attorneys and solicitors to practice in the bankruptcy courts, should be set at rest. There are many eminent practitioners who will not expose themselves to the humiliation of acting only on *sufferance*, and, indeed, it is manifest that a gentleman who appears before a legal tribunal, in behalf of his client, cannot independently and fearlessly discharge his duty, if he may at any time be stopped by the interposition of the counsel opposed to him or by the will of the presiding judge. Let him possess the acknowledged right to represent his client, and we doubt not that he will exercise it with due discretion (37 Leg. Obs. 143).

Manchester Law Association.—The honorary secretary, Mr. T. Taylor, has resigned, and Mr. James Street has been elected in his place.

Affidavits — “*Instant*.” — In mentioning a date in the body of an affidavit it will not do to state that it was, for example, on the “1st of January, *instant*,” but the year should be set out (*Foster v. Tattersall*, 27 Leg. Obs. 241).

Appointments. — Mr. Boothby of the Northern Circuit has been appointed recorder of Pontefract.

Hilary Term (1849) Examination. — The number of notices for admission on the roll in this term, including those under judges’ orders, amounts to no less than 206. Of these candidates, however, eighty-six have been already examined, leaving for examination in Hilary Term only 120. Supposing that the usual average should fail to attend, or complete their testimonials, the accession to the ranks of the profession will be reduced to about 100—37 Leg. Obs. 210.

Democracy of the profession — Its prostration. — If any of our readers wish to see these questions discussed, we must refer them to the *Law Times* and the *Legal Observer*, as we cannot occupy our pages with such matter. It is a pity that these two publications, though rivals, cannot find something better to do than to be for ever wrangling. The *Legal Observer* thus gives a thrust at the editor of the *Law Times*: “Let us add, that although we are aware a few members of the bar, whose capacity for business has been rarely, if ever tested, have lent themselves to some potty speculations directed against the other branch of the profession, the bar, generally, as a body, we are convinced, have no sympathy with this movement, and will be the foremost, whenever the opportunity arises, to repudiate the injudicious advocacy, which, assuming to uphold, really degrades its character.”

Retainers. — The rules framed by the Law Society as to retainers, do not meet with universal approbation, and some parts will no doubt be modified. It should be stated, besides sending the proposed rules twice to every Queen’s counsel and serjeant, copies of them were laid before the Society of Judges and Serjeants, and the Benchers of all the Inns of Court.

Attorney — Negligence. — In an action for negligence against an attorney for preparing a deed of assignment of a lease, varying from an agreement, upon which an action was brought, and the present plaintiff, by reason of the variance, was non-suited; it appeared that the defendant had consulted a pleader upon the matter, and that the action proceeded upon his advice. C. B. Pollock told the jury “that an attorney was bound to use due attention and skill, and all reasonable care; but it must be remembered, that an attorney was not an insurer by any law, the same as a carrier was; he could not insure the result of a case; and he must say, that he should be much astonished to hear a jury say that an attorney had been guilty of

want of reasonable care where he had taken and acted upon the opinion of an eminent pleader," (*Manning v. Wilkin*, *Nisi Prius*, 37 L. Obs. 194).

NEW COUNTY COURTS.

Costs—Suggestion.—The 129th section of the County Courts' Act enacts that in cases within the act where the plaintiff recovers less than £20 in contract or £5 damages, "the plaintiff shall have judgment to recover such sum only, and no costs." It has been decided that the proper course to pursue to deprive the plaintiff of costs is to apply for leave to enter a suggestion on the record (*Brooker v. Cooper*, 12 Jur. 964). The affidavit need not negative any grounds for refusing the suggestion not mentioned in sects. 128 and 129; *i. e.*, that plaintiff is not an attorney, or that the case is excepted by sect. 58, as to ejectments, title to realty, devise, malicious prosecution, &c.; but it is for the other party to show such grounds if they exist (*Butler v. Corney*, 17 Law Journ., N. S., Exch. 265; acted on in *Hayter v. Fisher*, 12 Jur. 1004).

Clerks salaries.—No arrangement has yet been made fixing the salaries of the clerks and other officers of the county courts. Until an order in council is made, those officers will continue to be paid by fees, the scale of which is framed so liberally as regards the officers, that the clerks in some instances, receive a larger amount of remuneration than the judges, whose salaries are settled at £1,000.

Suggestion for costs (p. 27).—In order to enter a suggestion upon the roll to deprive a plaintiff of costs under the new act, *after judgment*, the form of the motion must be to set aside the judgment and to enter a suggestion; and a motion simply to enter a suggestion cannot be granted, there being a judgment entered upon the record (*Smith v. Roberts*, 12 Law Tim. 353; S. C. 13 Jur. 40).

Removing plaint—Mode of doing it.—*Quære*, whether the application to remove a plaint, from a county court pursuant to sect. 90, should be *ex parte*, or by summons to show cause (*Haddon v. Gompertz*, 12 Law Tim. 355; see *ante*, p. 26).

Suggestion for costs—Judgment by default.—"There is another point which it will be necessary to discuss some day, namely, whether, the 129th sect. of the 9 & 10 Vict. c. 92, applies at all to the case of a judgment by default. That section clearly contemplates a case where there is a *verdict* either for a plaintiff or a defendant on which the judge could grant a certificate" (*per Pollock*, C. B., in *Smith v. Roberts*, 13 Jur. 40).

Insolvency petitions.—Applications in the matters of petitions heard by the commissioners of the court for relief of insolvent debtors on circuit, previous to the transfer of the circuit jurisdiction by the 10 & 11 Vict. c. 102, must now be made in the county courts. *Re Wilcox*, 13 Law Tim. 248.

Appointment of assignees.—The court for relief of insolvent debtors in London has no control over the orders of the judges of the county courts appointing assignees in cases referred to them under the 10 & 11 Vict. c. 102. *Re Notten*, 12 Law Tim. 248.

NOTES OF RECENT LEADING CASES.

COMMON LAW.

DISTRESS.—*Goods in execution—Crops—Rent on execution*—8 Anne, c. 14.—It is a clear rule of law that goods in the custody of the law, as of the sheriff on an execution, cannot be distrained for rent. But as the 8 Anne, c. 14, s. 1, enacts that no goods in any messuage, &c., shall be taken by virtue of any execution, unless the execution creditor shall, before removal of the goods, pay to the landlord one year's rent, it was said by some of the judges in *Smallman v. Pollard* (6 Man. and Gr. 1001; S. C. 8 Jur. 246), that the landlord's right to distrain is preserved. However, in the late case of *Wharton v. Naylor* (12 Jur. 894), this dictum was considered by the Court of Queen's Bench, and the contrary thereto expressly decided. In that case it was held that goods seized under a writ of *fi. fa.* and sold by the sheriff, cannot be distrained for antecedent rent, of which the sheriff and the vendee had notice, and which they neglected to pay; though by virtue of sect. 1 of stat. 8 Anne, c. 14, the sheriff is liable to an action at the suit of the landlord if the goods are removed without payment of one year's rent. The action was one of trespass for breaking and entering the closes of plaintiff and cutting down growing crops. Plea, justifying under a distress for rent due for the closes from J. S. Replication, showing a judgment at the suit of plaintiff, against J. L., and a writ of *fi. fa.* under which the sheriff seized the growing crops and sold them to plaintiff, and that before a reasonable time had elapsed for cutting and gathering them, defendant distrained. Rejoinder, that the rent became due before the judgment; that the sheriff and plaintiff had no notice of it; that it continued in arrear, and did not exceed one year's rent; that defendant required the sheriff before he sold to plaintiff to pay the rent, of which also plaintiff had notice;

and that it was not paid : held, that the replication was good, and that it was no departure from the declaration, inasmuch as the admission in the replication that J. L. was in possession when the sheriff entered under the *fi. fa.* was consistent with the allegation in the declaration of plaintiff's possession at the time of the trespass. Mr. Justice Patteson in delivering the judgment of the court, said : " That goods which are in the custody of the law cannot be distrained for rent is clear ; the point, therefore, is, whether these crops are to be considered to have been in such custody when the defendants seized them. If the rent had been paid, it is plain that they would have been in such custody, though in the hands of a vendee under the sheriff, and not of the sheriff himself (*Peacock v. Purvis*, 2 B. and B. 362). In that case it is true that the rent distrained for accrued after the seizure under the *feri facias* ; but still it establishes the principle that the crops in the hands of the sheriff's vendee are as much *in custodia legis* as if in the hands of the sheriff until they are in such a state as to be capable of removal. The meaning of the 8 Anne, c. 14, s. 1, is, that the sheriff shall not remove the goods unless a year's rent be first paid. The seizure is lawful *primæ facie* ; but if the goods be removed without payment of the rent after notice that it is due, such removal renders the whole proceeding unlawful as regards the landlord, and subjects the sheriff to an action on the case at his suit. The goods, however, in the meantime, until they are removed, are *in custodia legis*. A bill of sale of the goods is not a removal, as was established in the case of *Smallman v. Pollard* (6 Man. and Gr. 1001 ; 8 Jur. 246). If, indeed, the sheriff receives the proceeds under such bill of sale, either from a stranger vendee absolutely, or from the execution creditor constructively, he, being an officer of the court, will be compelled, on motion, to pay over a year's rent to the landlord (*West v. Hodges, Barnes*, 211 ; *Henchett v. Kimpson*, 2 Wils. 140). But such bill of sale and receipt will not amount to a removal so as to subject him to an action. In the case of growing crops, possibly the sheriff may sell either for a sum of money to be paid immediately, or for a larger sum, to be paid on reaping and removal of crops ; and in the latter case he could not be called upon by the landlord, by motion, to pay his rent until the time came for the removal of the crops. The landlord is no way injured by this ; for if there had been no execution, and he had distrained the crops for his rent under stat. 11 Geo. 2, c. 19, s. 8, he could not sell them till they were reaped, and must, therefore, wait for his money till that time. There seems, therefore, to be no reason why he should be held to be authorised by the statute of Anne to do that which, at common law, he could not do, viz., to distrain goods *in custodia legis* ; but rather that that act intended to give him protection through the liability of the sheriff

in lieu of his right to distress, which is taken away by the seizure under a *feri facias*. "This appears to be the reasonable construction of the statute of Anne, in regard to goods of any kind seized by the sheriff; and it is more strongly in regard to growing crops, which, although liable to be taken in execution by the common law, were not liable to be distrained for rent until the stat. 11 Geo. 2, c. 19."

EVIDENCE.—*Bill in equity*—*Statements in, &c.*—In the late case of *Boileau v. Rudlin* (12 Jur. 899), the Court of Exchequer, after able arguments, considered the principles upon which a bill in chancery can be received in evidence at law against the party filing it. The case is a most important one, and the previous cases (many of them conflicting) were examined. The following are the propositions deducible from the decision of the Court of Exchequer:—
 1st. A bill in chancery is not evidence against the party in whose name it is filed unless his privity to it be shown (*Woollett v. Roberts*, 1 Chanc. Cas. 64).
 2nd. When that privity is established, it is *primary* evidence, on the principle of *Slatterie v. Pooley* (6 Mees. and Wels. 664; S. C. 11 Jur. 1038).
 3rd. Though when the privity is established the bill is admissible, yet it is merely so for the purpose of proving the fact that such a suit was instituted, and what the subject of it was; but it is not evidence by way of admission against the party by whom it was filed of the truth of the facts alleged or stated in it.
 4th. Proceedings after answer on a bill in chancery tend to diminish the presumption that it might have been filed by a stranger, and may be sufficient to establish the privity of the party in whose name it was filed.
 5th. *Scemle*, that the statements in bills of equity, as well as in pleadings at common law, are not to be treated for all purposes as positive allegations of the truth of the facts stated, but are only to be taken as the statement of the case of the party to the suit by whom they are made, and who for the purpose of the cause is bound by such of them as are material. Such statements, therefore, ought not to be treated in subsequent suits as confessions by that party of the truth of the facts so stated.
 6th. The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are conclusive evidence between them, for the purpose of terminating litigation; and so are the material facts alleged by one party which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it. Some of the cases referred to and explained were *Doe dem. Bowerman v. Sybourn*, 7 Term Rep. 2; *Taylor v. Cole*, note to S. C.; *Banbury Peerage case*, 1 Selw. N. P. 763, 9th edit.; *Medcalf v. Ives*, 1 Atk. 65, as affected by *Kelly v. Sneyd*, 2 Molloy, 208. The cases of *Brickell v. Hulse*, 7 Adol. and Ell. 454; *Gard-*

ner v. Moulst, 10 *Id.* 464; Cole v. Hadley, 11 *Id.* 807, are admission by conduct. The dictum of Tindal, C. J., in Fishmongers' Co. v. Robertson, 5 Man. and Gr. 192, that corporations suing on contract would be estopped in another action from denying it, is not supportable.

PRESCRIPTION.—*Right of way, &c.—Life excluded.*—By the Prescription Act (2 & 3 Will. 4, c. 71, s. 1), a party may obtain a title to a right of common and other profits *à prendre*, by a thirty years' enjoyment, and to a right of way or other easement by twenty years' enjoyment; in both which cases an extended enjoyment, namely, in the former case sixty years, and in the latter forty years, unless by consent, gives an absolute right. By sect. 4 the before-mentioned periods are to be deemed and taken to be periods next before action wherein the claim or matter is brought into question. But by s. 7, the period during which any person otherwise capable of resisting such claim shall be an infant, idiot, *non compos mentis*, feme covert, or *tenant for life*, &c., shall be excluded in the computation of the more limited periods. In the case of Clayton v. Corby (2 Q. B. Rep. 813), it was held that the period of an intervening life estate will be excluded altogether, and that it will be sufficient to show an enjoyment for several periods amounting together to thirty years; thus one period may be before and the other after the life estate, as an enjoyment of twenty years before, and five years after such life estate. In that case the plaintiff in answer to a plea of enjoyment of a right of profit *à prendre*, replied that a life estate was outstanding for twenty-seven years of the said thirty years. Since this case it has been a question whether a plaintiff is obliged to reply specially a life estate in order to take the time of its existence out of the period of the computation of thirty years. In the recent case of Pye v. Mumford (17 Law Journ., N. S., Q. B. 138), the plaintiff simply traversed the enjoyment of the thirty years stated in the plea, and after the defendant had given evidence of enjoyment for thirty years next before the action, plaintiff offered to prove that during a part of those thirty years the land had been held by a tenant for life. Whether he could do so, not having replied the life estate specially, depended upon whether the fifth section of the act which directs that any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment must be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation, was applicable to the present case? The court held that it was. If, indeed, the plea was to be read as *prima facie* asserting an enjoyment for the actual thirty years next before the commencement of the action counted in the ordinary manner, that action could not but be applicable. The court appeared unwilling to

go quite to this extent, but held the plea was to be understood as suggested in *Clayton v. Corby*, namely, "The thirty years alleged in the plea will be the thirty years actually or constructively next before the commencement of the suit, according as the plaintiff shapes his replication."

EQUITY.

BASTARD.—*Birth after divorce—Divorce fraudulent—Binding on issue.*—In the case of a divorce *à vinculo matrimonii*, the marriage is declared null and void as having been absolutely unlawful *ab initio*, and the issue of such marriage, though born before the divorce, are *bastards* (Co. Litt. 235 a). A marriage was solemnized between A. and B., but it was declared void by the Ecclesiastical Court. Some years afterwards, a child of A. and B. *en ventre sa mère* at the time of the sentence, and who necessarily was no party to the proceedings, claimed property in a court of equity as descendant of A.: held, first, that he was bound by the sentence, though he might avoid its effect by showing fraud and collusion in obtaining it; secondly, that such fraud and collusion must be shown to have taken place between the parties to the proceedings; and thirdly, that proof that the costs of the unsuccessful party had been agreed to be paid, that witnesses were not examined, and others not cross examined, and that the difficulties were not interposed which might have been, did not all together amount to fraud and collusion. Whether in such a case the child who was bastardised by the effect of the sentence had any means of showing that the sentence was erroneous. *Semble*, not (*Perry v. Meddowcroft*, 10 Beav. 122).

DEVISE.—*Chattels real—Trusts to assign—Construction—Who entitled to assignment from trustees.*—Testator devised real estate to the use of James David for life, remainder to trustees during his life to preserve, remainder to the first and other of James David's sons in tail male, remainder to John for life; remainder to trustees to preserve, remainders to his first and other sons in tail male, with similar remainders to trustees to preserve, and to his first and other sons in tail male, with remainders over; and he bequeathed certain chattels real and personal to trustees, upon trust to permit James David to receive the rents and profits thereof during his life; and from and after his decease to permit each and every of the several other persons aforesaid, to whom an estate for life in the said real estates was thereinbefore limited successively, and as each of them should become seised of said real estates under the aforesaid limitations thereof, to receive the rents and profits thereof, during his or their life or lives respectively, and from and after the decease of the last of the said last mentioned tenants for life as should become seised in manner aforesaid, or if

none of them should so become seised, then from and after the decease of James David, upon trust to assign said chattels real and personal to such person or persons as should then become seised of the said real estate under any of the limitations aforesaid, their executors, administrators, or assigns, and made William his residuary legatee. James David had three sons. James, who died without issue in his father's life time having devised and bequeathed all his real and personal estate to his brother William; John Henry, who died in his father's lifetime, leaving the plaintiff, his eldest son and heir at law, and first tenant in tail of the real estates under the will of the testator; and William, who survived his father. Held, that the plaintiff was entitled to an assignment of the chattels, real and personal, from the trustees (*Potts v. Potts*, 3 Jones and L. 353). The Lord Chancellor said: "The first question is, whether James, the son of James David, did upon the death of the testator take the chattels and paper absolutely. For that construction it was insisted that the persons to take were those who were intended to take the real estate; and that James did take a vested estate tail in remainder in the real estate. It was said that a code of laws was established by which a tenant in tail in remainder of real estate, unless prevented by express words would take the absolute interest in chattels directed to go along with the real estate; and that the court ought not on light grounds to break in upon this settled rule. The case of *Foley v. Burnell* (1 Bro. C. C. 274) was particularly relied on; for there, although the property was to be held and enjoyed by the several persons who from time to time should respectively and successively be entitled to the use and possession of the house, yet a child who became entitled to the real estate in tail, but not in possession, was held to take the chattels absolutely; which it was said, proves that the court, in favour of the vesting, did violence to the words. It was denied that there was a contingency in the direction to convey; but if there was, it was then insisted that the contingency had not yet happened; for William might yet become tenant for life of the real estate, and in that event, he would be entitled to the chattels, &c., for life also. The argument for William was not that he was now entitled for life, but that as residuary legatee, he was entitled to the interest as undisposed of. This part of the argument is, therefore, common to both claimants in opposition to the plaintiff. It cannot be disputed that no person could take the chattels who was not entitled to the real estates; but there is no general declaration in this will that the chattels shall go along with and be held by the persons entitled to the real estate. * * If a plain intention be expressed that no person shall take the chattels absolutely, who does not live to become entitled to the possession of the real estate, the court must execute that intention, just as in *Trafford v. Trafford* (8

Atk. 347), the direction that the person should take when he should attain twenty-one was acted upon ; although, as Lord Eldon several times observed in *Countess of Lincoln v. Duke of Newcastle* (12 Ves. 218), the court never directed the vesting to be postponed till twenty-one, except in *Trafford v. Trafford*, in which case the age of twenty-one was expressly fixed by the testator, which bound the court." As to the party entitled under the gift in the will, the Lord Chancellor said, "The true construction is that if James David's issue failed, John was to take for life ; and so as to William ; but that if at James David's death there was a person then seized of the estates (not being a tenant for life) the chattels should be assigned to him absolutely. The provision in like manner would apply to the issue of either of the two brothers ; but it would apply once only ; and in this case the event has happened upon which the trust is to be exercised. In the gifts to the other tenants for life after the death of James David (the first tenant for life) it is in effect expressed that they are only to take in default of issue male of James David ; and so successively of each preceding tenant for life. If they were not to take in preference to the issue of a previous tenant for life the trust to assign would naturally arise when, at the death of a tenant for life, there was first a tenant in tail in possession ; and the words are sufficient to carry that view into effect. This construction gives effect to every word in the will, according to its natural meaning, and does violence to none."

MARRIAGE.—*Restraint, contracts and covenants.*—A contract or covenant in general restraint of marriage is void (*Lowe v. Peers*, 4 Burr. 2225 ; Com. Dig. tit. "Chancery," 2 Q. 6. See the distinction as to devises of real estate and bequests of personalty, where there is no limitation over, *Pulling v. Reddy, Wilson*, 21 ; Cas. Chanc. 22 ; 2 Vernon, 293, 294). The ground on which a general restraint of marriage is held bad is *public* policy ; the state having an interest in the increase of its subjects. In the case of *Grace v. Webb* (16 Law Journ., N. S. Chanc. 113 ; S. C. 10 Jur. 1049, on appeal, 12 Jur. 987), A. covenanted with B. a single woman, by whom he had two children, to pay her for her life, subject to the proviso thereafter contained, an annuity of £40 : provided that if she should at any time thereafter happen to marry with any person, then the annuity should be reduced to £20. The Vice-Chancellor of England being of opinion that the sole motive for the introduction of the clause reducing the annuity was to induce the woman not to marry, held that the clause was void as in restraint of marriage, but this decision was, on appeal, overruled by the Lord Chancellor, on the grounds that as the grant was grounded on a contract and obligation on the part of the grantor, the parties claiming were bound by its terms, and that there was nothing in the proviso which rendered it void, on

grounds applicable to conditions subsequent in restraint of marriage. The condition, if there was one, being precedent and not subsequent. The Chancellor said: "The question turns upon the construction of the covenant, for there really cannot be any doubt as to the rule of the law; the questions which have arisen as to conditions subsequent in restraint of marriage do not appear to me to apply. There can be no doubt that marriage may be made the ground of a limitation, ceasing or commencing; it is unnecessary to refer to authorities for the purpose. *Richards v. Baker* (2 Atk. 321); *Sheffield v. Lord Orrery* (3 Atk. 282); *Gordon v. Adolphus* (3 Bro. P. C. 306), were cited in the argument. If then, this grant is a grant of £40 per annum until marriage, and from that event happening of £20 per annum for life, there can be no doubt that such a gift is lawful, and that after marriage there can be no claim for the £40 per annum. The claim is grounded upon contract and obligation on the part of the grantor; the parties claiming must, therefore, prove that their claim is within the terms of the contract and obligation. What then are those terms? * * Is there any contract or obligation to pay £40 per annum after the marriage of Elizabeth Castle? The argument in favour of the claim assumes that there is an unqualified grant of an annuity of £40 per annum for life, and an attempt to defeat the gift by an illegal consideration subsequent. This proposition, I think, fails in all its parts, for there is not any unqualified gift of an annuity of £40 for life. The contract and obligation is, to pay to Elizabeth Castle, during her life, subject to the proviso hereinafter contained, an annuity of £40 at certain times specified. The contract and obligation is not absolute and unqualified, but explained, qualified, and bound by the proviso, and must be continued precisely in the same manner as if the terms of the proviso had been introduced into and made part of the contract and obligation. It is, therefore, to pay £40 per annum to her during so much of her life as she shall remain unmarried, which brings the case within the unqualified rule of law as acted upon in the cases referred to. One of them, indeed, *Sheffield v. Lord Orrery* (3 Atk. 282), is, upon this point stronger than the present, for there was a gift for life, without any qualification in the terms of the grant, but a subsequent condition giving the property over in the event of marriage; and Lord Hardwicke said, that the gift over was to take effect on the marriage."

SPECIFIC PERFORMANCE. — *Landlord and tenant* — *Clause avoiding lease for act already done*—*Insolvency of tenant*. — In order to obtain specific performance of an agreement, the latter must be not only fair and reasonable, but also certain in its terms, though if it can be rendered certain it will be sufficient, on the principle *certum est quod certum reddi potest*. Thus an agreement to grant a lease with the "usual covenants" will be specifically performed. So the

subsequent voluntary act of one of the parties may do away with the uncertainty, but it should seem from the following case that a party is not obliged to do any act by which the required certainty may be obtained and the agreement become enforceable against him. An agreement to grant a lease, subject to such clauses as the landlord chooses to insert, will not be specifically performed, where the landlord insists on a clause for avoiding the lease on subletting, and the tenant has already sublet; and although the court would not allow him to specify unreasonable clauses, yet, *Seemle*, if he decline to name any, the agreement is too uncertain to be enforced. The subsequent insolvency and continuing embarrassment of the tenant are good grounds for refusing specific performance of an agreement for a lease, especially if there has been also laches (*Plunket v. Dease*, 10 Ir. Eq. R. 124). The Lord Chancellor said: "There would, I apprehend, be great difficulty in carrying out such an agreement as this, and enforcing a lease where nothing was said by the defendant about the covenants. When the contract is that the lease shall contain the usual covenants, the court will execute it according to the usage of the country, and will introduce such covenants as are commonly incident to the thing contracted for. There is nothing special in such a stipulation: but this is a different case; for it appears to me, from the expressions in the letter, that it was clearly designed to give the intended lessor the control over the covenants, and the power to select them. In the cases referred to by the counsel for the plaintiff (*Henderson v. Hay*, 3 Bro. C.C. 632; *Blakesley v. Whieldon*, 1 Hare, 176; *Jones v. Jones*, 12 Ves. 186), there was something in the contracts themselves to guide the selection of the covenants, and the court could insert such covenants as were of the description mentioned, and would not interfere with the tenure or estate to be granted, but would be consistent with it. I quite concur with these cases—I agree to the argument, that if Dease had specified what were the covenants he required to be introduced, and they were opposed to, and inconsistent with the contract, the court would reject them; but Dease has never specified what covenants he required; there is no writing specifying what they are to be; and, therefore, the contract is uncertain in a very important part of it. * * If I were called upon to execute this contract now, I should say that under it Dease might require covenants against alienation and sub-letting to be introduced. But the latter had been already broken. * * When I consider the condition of the plaintiff, who was an insolvent, I have equal difficulty in giving him relief. Even if he had acquired wealth, he has lost it again, for within the last two years his statement is, that he could not pay the requisite fees on an affidavit. It would be a strong measure to compel Dease to take a tenant in such circumstances, and after such a lapse of time."

CONTRACTS, ETC., VOID FOR SIMONY.

Simony defined.—Simony is a corrupt presentation or agreement for the presentation of a person to an ecclesiastical benefice for money, gift, or reward (1 Selw. N. P. 576, 11th edit.; 3 Steph. Com. 70, 2nd edit.; Bacon's Abr. tit. "Simony").

Simony at common law.—Simony is commonly classed as a statutory illegality, but it is not so entirely, though undoubtedly so far as practical results are concerned it may be so considered. It has been said that simony was no offence at the common law; and the case of Gregory v. Oldbury (Moor, 564), has been as to this point relied on. It is laid down in that case that a bond to pay money on a simoniacal contract is good, because simony is no offence at the common law. But, by attending to what is laid down in other books, it will appear that although simony *eo nomine* be not an offence, either at the common law or against the statute, for the word "simony" is not therein contained, a corrupt bargain for presenting to a benefice is an offence at the common law (see 2 Black. Com. 278; 1 Ld. Raym. 449; 5 Taunt. 745; Bac. Abr. tit. "Simony"). However as C. J. De Grey observed (2 Will. Black. Rep. 1054), "what is or is not simony now depends on the statute of 31 Eliz. c. 6, which did not adopt all the wild notions of the canon law; but has defined it to be a corrupt agreement to present. In Coke's Entries, 516, it is expressed '*simoniacè et corruptè*;' but the latter is the legal and effective word." It will be observed that in a statute we shall have to mention, namely, the 12 Anne, st. 2, c. 12, the words "simoniacal contract" are used.

31 Eliz. c. 6.—As before observed, the principal statute upon which the illegality of simoniacal contracts rests is the 31 Eliz. c. 6. By sect. 5 of this statute, "if any person or persons, or bodies corporate, shall for *money*, reward, gift, profit, or *benefit*, directly or indirectly, or for or by reason of any *promise*, agreement, grant, bond, covenant, or other assurance of or for any money, &c., directly or indirectly present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or bestow the same for any such corrupt consideration, *every such presentation*, &c., and every admission, institution, investiture, and induction thereupon, shall be *void*; and it shall be lawful for the Crown to present, &c., to such benefice, &c., for that one turn only; and every person, &c., that shall give or take such money, &c., or take or make any such promise, &c., or other assurance, shall forfeit double the value of one

year's profit of such benefice, &c., and the person so corruptly taking, &c., such benefice, &c., shall thenceforth be adjudged a *disabled* person to have the same. By sect. 6, "if any person shall for money, &c. (other than for lawful fees), or for any promise, &c., or other assurance for money, &c. directly or indirectly admit, institute, instal, induct, invest, or place any person in any benefice, with cure of souls, dignity, prebend, or other living ecclesiastical, every such offender shall forfeit double the value of one year's profit of such benefice, &c., and the same benefice, &c., shall be void, and the patron, &c., shall present or collate unto the same, as if the party so admitted, &c., were dead." The 7th sect. provides that no title to confer or present by lapse, shall accrue upon any avoidance mentioned in the act, but after six months next after notice given of such avoidance by the ordinary to the patron. By sect. 8, "if any incumbent of any benefice, with cure of souls, shall *corruptly* resign or exchange the same, or corruptly take, for the resigning or exchanging the same, directly or indirectly, any pension, money, or benefit, as well the giver as the taker thereof shall lose double the value of the sum so given, the one moiety as well thereof as of the forfeiture of double value of one year's profit to be to the Crown; and the other to him that will sue for the same, by action of debt, bill or information, in any of the King's Courts of Record."

It will be seen that the statute only inflicts a penalty by way of forfeiture, and that there is no express prohibition or avoidance of the contract, but then it is a general rule that every contract made for or about any matter or thing which is made unlawful by any statute, is a void contract, though the statute itself is silent as to this, and merely inflicts a penalty; because a penalty implies a prohibition, though there are not any prohibitory words in the statute (see *per* Holt, C. J., Carthew, 252; *per* Tindal, C. J., in 10 Bing. 110; *per* Cottenham, C., in 2 Myl. and Cr. 86; see *Ritchie v. Smith*, 13 Jur. 43). On the above principle, it has been held in the case of simony that although the statute of 31 Eliz. c. 6, only inflicts a penalty by way of forfeiture, and does not mention any avoidance of the simoniacal contract, yet the contract is void as being against law (see Bacon's Abr. tit. "Simony," A.).

12 Anne, st. 2, c. 12.—We defer examining the cases until after we have noticed another act, namely, the 12 Anne, stat. 2, c. 12. This statute was passed to obviate a doubt raised upon the statute of 31 Eliz. c. 5, whether if a clerk purchased for himself the next presentation to a benefice whilst it was full, with a view to be presented thereto after it was void, such purchase was an offence within the meaning of the act. To put an end to this doubt the 12 Anne, c. 12, enacted that "if any person shall for money, reward, gift, profit, or advantage, or for or by reason of any promise, agreement,

grant, bond, or other assurance, or for any money, &c., directly or directly, in his own name, or in the name of any other person or persons, take, procure, or accept the next avoidance or presentation to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, and shall be presented or collated thereupon; that every such presentation or collation shall be utterly void and of no effect in law, and such agreement shall be deemed to be a simoniacal contract; and it shall be lawful for the Queen's majesty, her heirs and successors, to present or collate unto such benefice, &c., for that time or turn only; and the person so corruptly taking, procuring, or accepting such benefice, &c., shall from thenceforth be adjudged a disabled person to have and enjoy the same, and shall be subject to any punishment, pain, or penalty, prescribed or inflicted by the laws ecclesiastical, in like manner as if such agreement had been made after such benefice, &c., had become vacant."

Advowsons.—It will be desirable to notice shortly the nature of an advowson, as a just notion of it will make the following remarks more intelligible:—Advowsons are, as is well-known, the subject of valuable ownerships, being capable of transfer from one party to another for consideration, or of descending to the heir, or of being devised to some other party in the same manner as other real property. C. J. De Grey (*Barnett v. Glubb*, Bacon's Abr. tit. "Simony," A.), says, "an advowson, which is a right of nominating to a benefice, being an incorporeal inheritance, may be conveyed like any temporal inheritance." But the right of presentation in the exercise of which the enjoyment of ownership of the advowson consists is a trust, and that too a public one. Accordingly, though the law considers it a valuable possession, it is not in the sense of a pecuniary value, and therefore it is that the law does not look at it as a thing capable of producing profit when it is in the hands of a person clothed with a fiduciary character. Thus a mortgagee cannot present on an avoidance, but the mortgagor has a right to present, although there be an express agreement to the contrary (see 2 Will. Black. Rep. 1053; *Coote's Mortg.* ch. 11; *Mackenzie v. Robinson*, 3 Atk. 558). The reason is because the value could not be brought into account, as the court could not allow the mortgagee to say he had made a profit by it, when the act itself was illegal. The advowson in fact is held as a public trust coupled with an interest; as a trust no court could take notice of any profit made of it, but as an interest the courts allow a sale of it. The right itself is a valuable right, but the exercise of the right is a public trust, which ought not to produce profit. The precise nature of an advowson is well stated by Lord Lyndhurst in the case of *Mirehouse v. Bennell*, 7 Bligh, N. S. 317, and by Lord Wynford, in *Fox v. Bishop of Chester*, 3 Bligh, N. S. 106. Lord Lyndhurst says: "An advowson is the

right of presenting to a benefice. It is an incorporeal hereditament attended with all the usual incidents of that species of property. It may be conveyed in fee, granted in tail, or for term of life or years, or for the next presentation; all these partial interests are carved out of the fee. While the church is full the right of presentation is annexed to the advowson, and passes with it into the hands of the party who becomes entitled by descent or devise, or otherwise. A grant of the advowson carries with it the right to the next presentation, if the church is full. If the church is vacant at the date of the grant the right of presentation takes a new direction. From the time of the vacancy it becomes a chattel: a personal chattel, which vests in the personal representative, a chose in action—fruit severed from the advowson, like arrears of rent. In such case the next presentation, according to all the authorities, passes not to the heir, but to the personal representative of the party dying seised of the advowson. So, if the advowson is granted for a term and the church becomes vacant, the lessee has the right to present, upon the ground that the right of presentation is severed from the advowson. Upon the same ground, where a married woman is entitled to an advowson and dies, the right of presentation is in the husband." Lord Wynford said: "The patronage of churches was at first yielded by the bishops to the lords of manors, who founded or endowed them, and annexed them to the manors in which the churches were situated. By the grant of a manor, the advowson appendant to it passes to the grantee. Many of these advowsons have since been severed from the manors to which they were appendant. But although advowsons, when in gross, as those which are separated from the manors to which they belonged are called, and are a species of spiritual trusts, yet they have been said by Lord Kenyon and other judges to be trusts connected with interests; and they certainly do not lose the temporal character which originally belonged to them, but may be sold either in perpetuity, or for the next or any number of avoidances."

As a general proposition, a conveyance of the advowson is not affected by the above statutes, except that in some instances the conveyance may be ineffectual so far as it affects to pass the immediate or next presentation (see judgment in 5 Taunt. 746; 2 Will. Black. Rep. 1054). The rule of the common law still remaining, by which an advowson is valuable ownership, to purchase an advowson, though with the prospect of the church becoming vacant, is not simony, and that though the purchaser had in view an early vacancy (Sugden's Law of Property, 672). In fact, the statutes have no concern about the inheritance, but only of the next presentation, or an actual avoidance. There is a great difference between giving money for the presentation, and giving money for the right to present. Where

the money is given for the presentation, the case is within the statutes, but where it is given for the right to present the transaction is not necessarily void.

A distinction is to be observed between a contract to which the clerk who is to be presented is a party, and a contract between two parties, neither of whom is a clerk. If two persons of the latter kind contract, or, indeed, if a spiritual person do so, not contracting for himself, the engagement is not void. The statute of the 12 Anne, st. 2, c. 12, is expressly aimed at contracts for the next presentation by clerks for their own benefit. Therefore, if a clerk in orders, or a layman with his privity, contract for the next avoidance, the incumbent being at the time in extremis, it is corrupt at the common law (*Smith v. Shelborn*, Cro. Eliz. 685; see on this case, *Noy's Rep.* 25, and 7 Bac. Abr. tit. "Simony," A). But the rule which the statute of Anne laid down is more extensive, for it disables every clerk from purchasing the next presentation in any case for his own benefit. And indeed, if a layman purchase for the benefit of the clerk, with the privity of the clerk, this is simony, though the incumbent be not at the point of death. This is by virtue of the statute of Anne, which thus carries the incapacity beyond anything the common law could have done (see *Sugden's Law of Property*, 672; *Fox v. B. of Chester*, 1 Dow., N. S. 416; *S. C.* 3 Bligh, N. S. 123).

If a clerk purchase for his own benefit an advowson, with a knowledge of the approaching death of the incumbent, it will be good, except, perhaps, as to the next presentation. Mr. Cripps (*Law of the Clergy*, p. 495) thinks it is not simony for the clerk to purchase for himself an advowson, however immediate may be the prospect of a vacancy. This proposition is rather questionable, and it is not clear whether in the case of the sale of an advowson at the time the incumbent was *in extremis*, and this circumstance was known to the clerk to be presented, with whose privity the purchase was made, the sale would be valid.

Where there is a purchase of an advowson during a vacancy of the living, the sale of the advowson is good, but the particular vacancy will not pass. In such a case the sound part can be easily separated from the objectionable part, and it is no objection that by the contract one entire consideration was paid for the whole advowson, including therein the actual vacancy. If, indeed, the sound part could not be separated from the corrupt, the whole transaction would be void. (See *Greenwood v. Bishop of London*, 5 Taunt. 746).

Subject, therefore, to the distinctions above noticed, it may be broadly stated, that it is not simony for a clerk in holy orders to purchase an advowson where it is not vacant, though the purchase

will necessarily carry with it the next presentation, the purchase of which by itself is not allowed by the statute of Anne.

As to purchases of the next presentation by laymen (and the same is the case with respect to clergymen when *not* for their own benefit), if the church be actually vacant at the time, the contract is wholly void, and this though the purchaser have not in view the presentation of any particular clerk.

Where the church is not actually void, but there is a great probability of a vacancy, the sale either of an advowson or of the next presentation to a layman will be good, if the purchase be without the privy of the particular clerk to be presented (Sugden's Law of Property, 672). But if the purchase be with the privy of the particular clerk to be presented it will be void. (See *Barrett v. Glubb*, 2 W. Black. Rep. 1052; 7 Bacon's Abr. tit. "Simony," p. 237, 7th edit.; *Fox v. Bishop of Chester*, 2 Barn. and Cress. 635; 3 Bligh, N. S. 123). The case of *Barrett v. Glubb* was this: Barrett having notice that the incumbent of a rectory, with cure of souls, was upon his death-bed, and that it was uncertain whether he would live out the ensuing night, purchased the advowson of the rectory. The incumbent died the day after the purchase, and then Barrett presented Reynell. The question was, whether the presentation of Reynell was void, by reason of its having been a simoniacal contract. The unanimous opinion of the Court of Common Pleas was that the presentation was not void. C. J. De Grey said that (we are quoting from Bac. Abr.) "the 31st Elizabeth, c. 6, only relates to presentations, and consequently the sale of an advowson, even during a vacancy of the benefice, is not thereby prohibited, except the sale be connected with a corrupt contract for presenting. But, if an advowson be granted during a vacancy of the benefice, the presentation upon that vacancy does not pass by the grant; it being a fruit fallen, or, as is laid down in the case of *Leak v. Babington*, Cro. Eliz. 811, a chose in action. A *bond fide* purchase of an advowson is good, at what time soever it is made; and a corrupt purchase, whenever it is made is bad. That which is said in the case of the *Bishop of Lincoln v. Woolforston*, 3 Burr. 1510, has been mentioned, namely, "that the court were clear, that a grant of a next presentation, or of an advowson, made after the church was actually fallen vacant, was a void grant." But this, so far as it relates to the grant of an advowson, seems to be a mistake of the reporter. As the purchase of the advowson in the present case is not stated to have been connected with any corrupt contract for presenting Reynell, or with a design of presenting him, neither of these things is to be presumed, and, consequently, the presentation of him is not void."

Upon the same principle that a dealing with an advowson whilst

here is a vacancy is void as to that vacancy, a contract for an advowson with an agreement for the incumbent to resign, or for the party selling to procure the resignation, is void. But it does not follow that because the incumbency is voidable, that the contract is void, even as to the next presentation, if there is no collusion between the parties. (See *Alston v. Atlay*, 6 Nev. and Man. 686). Therefore, except where the clerk himself is the purchaser, actual vacancy of the living is the true criterion of a simoniacal contract; unless it be a case where the incumbent is *in extremis*, and then the privity of the clerk will be sufficient to render the contract simoniacal, though if there be no privity, the incumbent's being *in extremis* will not be material. (See *Fox v. B. of Chester*, 2 Barn. and Cres. 635, and in Dom. Proc. 6 Bing. 1).

RECENT STATUTES (11 & 12 VICTORIA).

[Continued from p. 45.]

Poor Irremovable Amendment Act—Joint-Stock Companies Winding-up Act—Nuisances and Contagious Diseases Prevention Act.

Poor Irremovable Amendment Act. CHAP. 3.—We have noticed some cases on the 9 & 10 Vict. c. 66 (see Abridg. Magistrates, &c., Cases, p. 7), the proviso of sect. 1 of which is as follows: "Provided always that, whenever any person shall have a wife or children, having no other settlement than his or her own, such wife and children shall be removeable whenever he or she is removeable, and shall not be removeable when he or she is not removeable." This proviso is now repealed, and in lieu thereof it is enacted: "Provided, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removeable from any parish or place from which he or she would be removeable, notwithstanding any provisions of the 9 & 10 Vict. c. 66, and should not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the said recited Act." This provision does not affect any appeal of which notice was given prior to its passing, the 4th of September, 1848.

Joint-Stock Companies Winding-up Act. CHAP. 78.—This act, which it is expressly enacted shall be called the "Joint-Stock Companies Winding-up Act, 1848," is intended to render the dissolution and winding-up, or the winding-up of joint-stock companies practicable, under the direction of the Court of Chancery. Its provisions are very numerous and minute, and all we can here do, as with the

other statutes containing so many sections, is to present an intelligible summary of its chief provisions. It includes all companies corporate or incorporate, which are included in 7 & 8 Vict. c. 111, and in the 8 & 9 Vict. c. 98; all banking companies which would have been within those two acts, if they had not been specially exempted from the 7 & 8 Vict. c. 110, all companies which under the 9 & 10 Vict. c. 28, shall have become bankrupt before the 1st of March, 1848, and all companies, associations, and co-partnership formed after the passing of the act, where the capital is to be divided into shares, and the shares transferable without the express consent of all the partners. It includes also, with certain exceptions, mining companies and benefit societies not enrolled. The 5th section, coupled with the 14th, constitutes the essence of the act. By it power is given to any person being or claiming to be a contributory, to present a petition to the Lord Chancellor, or to the Master of the Rolls, for the dissolution and winding-up of any undissolved company, or for the winding-up of the affairs of any dissolved company, in certain cases. And by the 14th section, the court may either dismiss such petition, or may make an order for the dissolution and winding-up, or for the winding-up, as the case may be, referring such winding-up to one of the Masters of the court.

The cases in which a petition will lie, stated shortly, are—1. When a company has committed an act of bankruptcy within the 7 & 8 Vict. c. 111, and 8 & 9 Vict. c. 98. 2. If a company has filed a declaration with the Lord Chancellor's secretary of bankrupts, that it is unable to meet its engagements. 3. If a judgment shall have been recovered against a company, and it does not, within a certain time, and after certain proceedings, satisfy such judgment. 4. If any decree or order in equity against the company for payment of money shall not, within certain limits as to time, &c., be obeyed. 5. If any action for money due from a company shall have been brought against a contributory, and the company shall not in due time, and after certain proceedings, indemnify such contributory. 6. If any creditor, whose debt would, in amount, support a fiat, shall have taken certain proceedings at law to claim such debt, and the company shall not in due time have paid it, or entered an appearance to defend. 7. If any company shall have been dissolved, or have ceased to carry on business, or be winding-up, but not wound-up; and 8. If any other satisfactory ground can be shown to the court.

The petition must be advertised and served at the head or only office of the company, or any member, officer, or on servant of the company there, or if no such person can be found there, by leaving it at the head or only office of the company, and if no office can be found, then by serving it upon any member, officer, or servant generally. And if neither officer nor person can be found, the court may, on

proof of the advertising, hear the petition without proof of service. Nearly all the clauses of the act subsequently to the 14th, relate to the details of working out the winding-up of the company in the Master's office by the agency of the person styled "the official manager." It is material, however, to observe that, by the 99th section, an appeal against the decision of the Master, on any point, lies to the Lord Chancellor or Master of the Rolls, on motion simply, without the necessity of objections and exceptions. That by the 101st, any order of the Master of the Rolls, or of any of the Vice-Chancellors, may be re-heard, on motion, before the Lord Chancellor. And that by the 102nd an appeal lies to the House of Lords from all orders made under the act.

The effect intended by this act, and which will probably be produced by it, is to put an end to all the difficulties which render the winding-up of an unsuccessful company by a suit in Chancery nearly impossible, by sweeping away, at one blow, all machinery of bill and answer, with its difficulties as to parties, and the resulting inconveniences and delays, substituting for the initiative process a petition; representing by force of the act, every person interested in it primarily by the official manager: and bringing before the court all parties not represented, or not thinking themselves represented by him, by serving the petition on the ideal representative of the company, its office, or any one found there. The act, in fact, transfers on petition, the whole estate of the company to a trustee and then sends the estate into the Master's office, to be there administered under the instrumentality of such trustee, very much as the estate of a deceased person is administered under the instrumentality of his executor.

Already there have been very many cases decided on this statute, and we shall notice them in the "Abridgment of Practice Cases."

Nuisances and Contagious Diseases Prevention Act. CHAP. 123.—This is an act to renew and amend the temporary act of 9 & 10 Vict. c. 96, for the removal of nuisances, &c. The object of it is to enable certain public bodies in England and Ireland, upon the receipt of a notice in writing (in the form given in a schedule to the act), from two householders, of the filthy condition of any building, or of the existence of certain nuisances, to cause (after twenty-four hours' notice, or without any notice in cases of emergency) an examination of the same, and if upon such examination, or upon the certificate in writing of two legally qualified medical practitioners, it appears that the nuisance, &c., exists, the public body is to make a complaint before a justice, who is thereupon to summon the owner or occupier of the premises so examined, to appear before two justices to answer such complaint.

The public bodies alluded to are: the town council, the trustees

or commissioners for the drainage, paving, lighting, or cleansing, or managing, or directing the police of any city, town, borough, or place, or any other body of a like nature, or any commissioners of sewers, or guardians of the poor, or in Ireland the officers of health of any parish.

The cases to which the act applies are, when any dwelling house or building is in such a filthy and unwholesome condition as to be a nuisance to, or injurious to the health of any person; or, where upon any premises there is any foul and offensive ditch, gutter, drain, privy, cesspool, or ashpit, or any ditch, gutter, drain, privy, cesspool, or ashpit, kept or constructed, so as to be a nuisance to, or injurious to the health of any person; or, where upon any such premises, swine, or any accumulation of dung, manure, offal, filth, refuse, or other matter or thing is kept, so as to be a nuisance or injurious to the health of any person; or, where upon any such premises, (being a building used wholly or in part as a dwelling house) or being premises underneath any such building, any animal is kept, so as to be a nuisance or injurious to the health of any person.

Upon the hearing of complaint, the justices are empowered (upon being satisfied of the justness of the complaint) to make an order for cleansing, whitewashing, or purifying such dwelling house or building, or for the removal or abatement of any such cause or causes of complaint, in such manner, and within such time as shall be specified in such order (not being more than two clear days exclusive of Sunday, after service of the order). If such order be not complied with, the owner or occupier against whom it is made will be liable to a penalty not exceeding ten shillings for every day during the continuance of his default; and the public body, by themselves or agents, are authorised to enter such premises, and cleanse, whitewash, or purify the same; or remove or abate the cause or causes of complaint, in respect whereof the said order is made. The above provisions are to be found in sect. 1 of the act. Section 2 relates to Scotland. By sect. 3, the costs and expenses incurred by the public body may be recovered from the owner or occupier of the premises, in the county court, civil bill court, or in Scotland before the sheriffs, or before two justices, by distress and sale of the goods and chattels of such owner or occupier. By s. 4, certain necessary expenses, not recovered from the owner, &c., are to be defrayed out of the poor's rates. By sect. 6, surveyors of highways are required to cleanse open ditches, gutters, drains, and water-courses upon, adjoining, or by, or along the sides of any highway. By s. 7, suffering any sewage, &c., to run or flow into or remain in any open ditch, &c., so as to be a nuisance, is a misdemeanor. There are provisions for Privy Council issuing orders to enforce act, and as to poor law commissioners and guardians of the poor, and

some technical regulations as to describing the owners and occupiers. By sect. 16, whosoever shall wilfully obstruct any person acting under the authority of the act of Parliament is made liable for every such offence to a penalty not exceeding five pounds. By s. 17, all penalties imposed by the act for offences committed in England or Ireland may be recovered by any person before any two justices, and may be levied by distress and sale of the goods and chattels of the offender.

SUITS BY UNCERTIFICATED BANKRUPTS.

The following case upon the incapacity of an uncertificated bankrupt to maintain a suit in equity will be found well worthy of perusal. The judgment of the Irish Master of the Rolls enters fully into the cases decided in England on the same subject. We take the case from a weekly periodical called the "*Irish Jurist*," the reports in which appear to be very creditable. The cases we allude to is *Wyse v. Waters* (1 *Irish Jurist*, 130). The bill was filed by an uncertificated bankrupt to raise the arrears of an annuity, making the assignee a defendant, and charging that the arrears due amounted to £646, that of the creditors who proved under the commission all had signed a composition deed save one, to whom the sum of £130 was due, and also charging specific collusion between the assignee and the debtor. A demurrer by the assignee was allowed, but without costs. The Master of the Rolls said: "As a general rule, an uncertificated bankrupt cannot take any proceeding against his assignee; for instance, a bill for an account will not lie, for matters of this nature can be investigated in as satisfactory a manner by means of the equitable jurisdiction of the Court of Bankruptcy, as in the Court of Chancery, and this jurisdiction is considered to be exclusive, as stated by V. C. Wigram in *Preston v. Wilson* (5 Hare, 185). The effect of the bankrupt law is to exclude the jurisdiction of this court in cases to which it would otherwise extend. To take cases out of this rule, into some bills the statement has been introduced that there would be a surplus to which the bankrupt would be entitled, and in others the charge of collusion has been made against the assignee, but the effect of all the decisions taken together would seem to show that if the surplus is to be ascertained by an account, a court of equity will not interfere; and it is well settled that the refusal of an assignee to sue will not, of itself, give this court jurisdiction. In the case of *Kaye v. Fosbrooke* (8 Sim. 28), both circumstances occurred; there was the allegation of a surplus, and a refusal by the assignee to sue,

yet it was held insufficient. As to the case of *Barton v. Jayne* (in 7 Sim. 24), referred to as an authority, I do not think I would be justified in acting upon it after the observations by Lord Cottenham in the case of *Heath v. Chadwicke* (2 Phill. 649). He says: '*Barton v. Jayne*, and the case under appeal are the only decisions I am aware of holding that such bills can be maintained.' The authority of *Barton v. Jayne* I consider is much affected, if not overruled by that case. It is plain the fact of there being a surplus is not sufficient, and a refusal to sue will not take the case out of the rule. The present bill, however, is sought to be sustained on the ground that there are distinct charges to show that there is a surplus ascertained, and also collusion on the part of the assignee, who refuses to sue. * * The authorities on this point cannot be considered as well settled until the opinion expressed by Lord Cottenham in the case referred to, and from the great authority of his decisions I cannot easily be induced to decide against any opinion clearly expressed by him. It is to be remarked, however, that there is not a single case referred to by Lord Cottenham in his judgment which has decided this question. In *Kaye v. Fosbrooke* there was no charge of collusion, while in the case before Lord Cottenham there was such a charge, therefore it is not an authority on the point. In *Spragg v. Binkes* (5 Ves. 587), there was no charge of collusion. In *Hammond v. Atwood* (3 Mad. 158), the bill sought to impeach the commission, and could not be sustained on that ground. The most important case upon the subject was that of *Tarleton v. Hornby* (1 You. and Coll. Ex. Cas. 162), in the Court of Exchequer, and was not alluded to by Lord Cottenham in his judgment. In that case it was decided that an uncertificated bankrupt cannot file a bill for an account, and if the bill is not maintainable independently of the collusion, such a charge is not sufficient to sustain it. The existence of a surplus, with a statement of collusion, is not sufficient to sustain it. The existence of a surplus, with a statement of collusion, is not sufficient to enable this court to assume jurisdiction, and take the case out of the Bankruptcy Court. It is said, however, that the effect of there being an ascertained surplus distinguishes this case, but I do not think the allegation of a surplus is sufficiently clear to distinguish this case from the one before Lord Cottenham.

* * With the exception of the case of *Barton v. Jayne*, which must now be considered as almost overruled by the case of *Heath v. Chadwicke*, there is no authority to show that this bill is maintainable, and I do not think I can so decide consistently with the high authority of Lord Cottenham. I will therefore allow this demurrer without costs. In *Preston v. Wilson* (11 Jur. 201; 8 G. 5 Hare), the assignee submitted to act as the court should direct, and the reasonable course in the present case would have been for

the assignee to leave the matter to be settled between the plaintiff and the principal defendant, for the assignee has not the slightest personal interest in the matter. * * If an assignee refuse to discharge his duty, the course is not to file a bill against him, as it would be against an executor; the proper course is to apply to the Lord Chancellor sitting in bankruptcy, and obtain an order directing the assignee to sue, upon an offer to indemnify, the very course which has been taken in the present case. * * The assignee should have submitted to the court, and not have endeavoured to assist his friend, as appears from the statements in the bill, and, as in the case of *Preston v. Wilson* (5 Hare), should have submitted to the jurisdiction of the court, and have aided the plaintiff in the recovery of this sum."

NEW COUNTY COURTS.

Recovery of possession of small tenements—Ousting jurisdiction.—Where a tenant after notice to quit, refuses to deliver up possession of the premises occupied by him, and a plaint has been entered in, and a summons thereupon issued out of, the county court, under sect. 128, the fact of the tenant appearing to such summons and showing cause is not sufficient to oust the county court of its jurisdiction to grant a warrant of possession, but it is for that court to determine whether the cause shown is sufficient or not. *Fearon v. Nowall*, 17 *Law Journ.*, N. S., Q. B. 161.

Suggestion to deprive plaintiff of costs—Doubtful question [*ante*, pp. 27, 28]—*Cause of action, "material part."*—Where orders for advertisements in a newspaper were given at an office situate within the jurisdiction of the Westminster county court, and the defendant's place of residence was also there, but the newspaper was printed in the city of London, in an action for the recovery of the price of inserting the advertisements, a verdict having been found for the plaintiff for £6 5s. on motion to this court, a rule was made absolute for entering a suggestion on the roll, in order to deprive the plaintiff of his costs, under sect. 129 of the 9 & 10 Vict. c. 96. *Quere*, if, under such circumstances, the cause of action can be said to have arisen wholly or in some material point within the jurisdiction of the county court, within which the defendant dwelt or carried on his business, within the meaning of sect. 128 (*Ghialin v. Dean*, 13 Jur. 82). *Per Patteson, J.*: "According to *Butler v. Corney* I ought to grant this rule. There the court seemed

to think that the rule should be made absolute, in order that the parties might have an opportunity of raising the question upon the record; for then the construction of the statute would be open to argument. Following that decision, I think the rule in this case must be made absolute. I confess I should not have dreamt of such a construction as my brother Alderson seemed to think the statute capable of bearing. This makes the doubt if I am right, in the construction I am inclined to give to the meaning of the words 'if any material part arise within the jurisdiction.' He certainly has raised a doubt in my mind. This rule, however, must be made absolute, for entering a suggestion, when the question may be determined elsewhere."

Liability of clerk for fitting up court.—The defendant, clerk to a county court; established under 9 & 10 Vict. c. 95, gave orders to the plaintiff to fit up the court-house: held, that neither the fact of the defendant's being clerk to the county court, nor the subject-matter of the contract, raised any legal presumption to exclude the defendant's personal liability for the expenses incurred. *Astley v. Hutchinson*, 17 Law Journ., N. S., C. P. 304; S. C. 12 Jur. 962. The defendant contended that he ought to be deemed to have given the orders as a public officer, upon the credit of the treasurer of the court, or upon the credit of the funds authorised to be raised by the act creating the court, and that in fact he had brought his case within the principle of *Macbeath v. Haldimand* (1 Term Rep. 172), *Myrtle v. Beaver* (1 East, 135), and *Gidley v. Palmerston* (7 Moore, 91), in which it was determined that an action would not lie against a public agent for anything done by him in his public character or employment. But the court thought that the defendant's situation was in no respect analogous to that of public officers acting on behalf of a known department of the state, and in discharge of duties incident to their public employment.

Suggestion for costs—Judgment—Alternative.—Where a defendant about to apply for a suggestion to deprive the plaintiff of costs under the County Court Act, 9 & 10 Vict. c. 95, cannot ascertain whether judgment has been entered, the court will grant the rule to set aside the judgment if entered, and enter a suggestion, &c. (*Vicars v. Mould*, 13 Jur. 85).

Costs—Suggestion for—Cause of action in material point—Within jurisdiction of county court—Plaintiff and defendant residing in different districts.—The following is a very important decision on the new county courts:—When any one item in a tradesman's bill consisting of items so connected together as to form one "cause of action" within the 63rd section of the 9 & 10 Vict. c. 95, as expounded by the Court of Exchequer, in *Grimby v. Ackroyd* (1 Exch. Rep. 479; 12 Jur. 357), arises within the jurisdiction of a county court, the

cause of action in some material point arises within that jurisdiction, and the superior court has not concurrent jurisdiction under 128th section. In an action brought in this court on a tailor's bill for less than £20, the plaintiff resided and carried on his business within the jurisdiction of the county court of C., and within twenty miles of the defendant; the defendant resided within the jurisdiction of the county court of B., and carried on his business within that of W. All the work was done at the plaintiff's residence; and as to three items of the demand, the order was given and goods delivered at the residence of the defendant; as to ten others the orders were given and the goods delivered at his place of business; while in one case the order was given and the goods delivered at the plaintiff's residence; the plaintiff having recovered the amount claimed: held, that the superior court had no concurrent jurisdiction with the county court under the 128th section of the 9 & 10 Vict. c. 95, and consequently that the 129th section operated to deprive him of costs (*Wood v. Perry*, 13 Jur. 129).

Clerks' salaries.—We are informed that our notice as to clerks' fees in the county courts in our last does not apply to the junior clerks, who are said to be very insufficiently paid. We understand that the authorities are now obtaining returns of the fees, so that we may shortly expect some regulation for fixed salaries. It is said, too, to be in contemplation to appoint a distinct clerk for each court, and to abolish the assistant clerkships.

MISCELLANEA.

Provisional directors. — Actions against provisional committee-men are likely to be seriously checked, for it has been clearly laid down in two recent cases, that an action for money had and received will not lie by a railway allottee to recover deposits from provisional directors, unless it appears that the money deposited came into the hands of the defendants, or that they exercised some control over it. This rule has been distinctly propounded in a deliberate judgment in the Queen's Bench, after a consideration of *Walstabb v. Spottiswoode* (15 Mees. and W. 501) and *Wontner v. Shairp* (4 Com. Bench Rep. 404); and although the plaintiff, in the first instance, recovered a verdict, a non-suit was ultimately directed upon this ground (*Watson v. Earl Charlemont and others*, 37 Leg. Obs. 195). In the more recent case of *Gurney v. Ingestrie, Nisi Prius*, C. B. Pollock expressed a decided opinion in conformity with the principle

laid down in the above judgment, holding that the action for money had and received will not lie unless the deposit is paid to the account of the defendant personally, or it can be shown that he has exercised some control over the disposal of the fund.

Peer—Privilege from arrest.—A peer of the realm imprisoned on writs of execution is entitled to be discharged, notwithstanding he has not taken his seat, nor the oaths prescribed (*McCabe v. Lord Harley*, 37 L. Obs. 195).

"Soup system"—Prosecutions at Sessions—Counsel—Magistrates' Clerks.—The appellation "Soup System" belongs to a particular mode in which the administration of criminal justice at Quarter Sessions is carried on. The preparation of the briefs and the management of the different matters connected with a prosecution, such as procuring additional evidence, taking care that the witnesses are ready when called upon, the payment of their expenses, &c., &c., is usually entrusted to those who were employed in the original investigation, namely, the clerk to the magistrates before whom it took place. Common sense would suppose none so well fitted to undertake it, as they are necessarily better acquainted with the circumstances of each particular case than any one else could be. But in many places, from mistaken motives of economy, a different course is followed, and instead of the clerks of the respective magistrates being allowed to prepare the briefs and manage the prosecutions, a person is specially appointed by the magistrates of the county for this purpose. As a payment for his trouble he is allowed a certain sum upon each prosecution, considerably less than what would be a sufficient remuneration to the magistrates' clerks, the smallness of the fee being abundantly compensated by the number which this monopoly gives him. The briefs thus prepared are distributed (professedly) in equal portions, one by one, as bills of indictment are found against the prisoners, among the different members of the bar, who attend this court, and this mode of doing business, from the similarity it bears to that of doling out basins of cheap soup to paupers, or else, and perhaps with greater probability, from the custom which formerly existed, of handing round soup at dinner as a matter of course, and without consulting the guests whether or not they wish to take it, has received the name of the "soup system," and the person who hands round the briefs is called the soup distributor (10 Law Mag. N. S., p. 104).

Railways—Non-liability for surgical assistance to passenger.—After noticing the case of *Cox v. Midland Railway Company* (13 Jur. 65) a writer in the "Jurist," (vol. 13, pt. 2, p. 54) concludes "Looking at all the incidents of the question, the safety of the public, and the requirements of common humanity, we think that Railway Companies should at once declare, that they will be liable in the first

instance, for all expenses reasonably incurred, on behalf of persons who have been injured on their line of railway, but that such liability shall be no admission of their liability for the accident; and that if the accident has occurred through the party's own negligence or wilfulness, he shall reimburse the company the expenses. If such a resolution is not come to by the companies themselves, we trust that the legislature will exert its compulsory powers for this object (13 Jur. pt. 2, p. 54).

Appeals in criminal cases.—All the while that objections are made to appealing on matters of fact, to any other tribunal than a jury, there is, in reality, such an appeal; for what else is the application and misericordiam to the Crown? It is in form a prayer for pardon. It is, in reality, an appeal to the Secretary of State to review the facts; for the law, we believe, never attempts to review; and the Secretary of State refers it to the under Secretary of State, who is, of late years at least, always a barrister. So that there is, really, an appeal from a jury to one single minister, not a lawyer, who, aiding his inquiries by the assistance of a lawyer, may and does from time to time decide that a jury has incorrectly found its facts. How similar in principle, yet how superior in practice, would be an appeal to a given body of judges on matter of fact as well as of law (13 Jur. pt. 2, p. 14).

Catalogue of another man's private collection of pictures, &c.—*Prince Albert v. Strange.*—This well-known case has raised many nice questions, which will doubtless before long require consideration in courts of equity, and the practical application of which may be beset with difficulties. "Put the case, that the defendant had sworn distinctly that copies of the etchings had been shown to him by a person of such station as to make it probable that he had a right to shew them, and with distinct liberty to make a catalogue of them; or put the case, that the plaintiff's servant had left the etchings exposed publicly in the street, so that any stranger passing by might see them and make a catalogue of them; would such a state of things amount to a dedication to the public sufficient to waive the right of concealment of the author, and let in the right of the percipient to use his senses, and acquire knowledge and use it. These, and many other questions will arise, no doubt, in cases that will follow the case of Prince Albert v. Strange; and in the mean time, all that can be said is, that where an author has not dedicated his works to the public, any other person will be restrained from communicating to the public, not only the works themselves, but the effect of their existence, and the particular designation of their mode of existence (13 Jur. pt. 2, p. 47).

Re-admission of attorney — Intermediate practice.—Where an attorney swears unqualifiedly that he has not practiced since the ex-

piration of his last certificate, and it is proved that he has practised at the quarter sessions, the renewal of his certificate will be refused (Decided at judge's chamber, re Fothergill, 37 Leg. Obs. 300).

Application against attorney.—It is a grievous thing to observe the number of applications made against attorneys during the last term. There were not only two cases by the Incorporated Law Society to strike attorneys off the roll, and some opposed re-admissions; but two others were made by the aggrieved parties at their own expense (37 L. Obs. 315). The "*Law Times*," after observing that many rules had recently been moved against attorneys for not paying over money received by them for their clients, or for not properly applying money received by them for their clients, or for not properly applying money received from clients, advises the attorneys thus:—"Never keep money in your hands belonging to your clients. Do not let it so much as pass into your account, beyond an entry of the fact of its receipt and payment. Within twenty-four hours after you have received it, *pay it to the owner*." Better advice cannot be given.

Certificate duty.—In connection with the movement for taking off the certificate duty of attorneys it is stated, that several hundred attorneys have failed to pay it within the time fixed by the act, namely, the 16th of December in each year. In the last year 399 attorneys did not pay it until the following year, and were consequently excluded from the stamp office law list. Of these, 116 paid only within the last month of the year; and 191 having neglected for upwards of a year, were compelled to give public notice to renew their certificates (37 L. Obs. 308). [Some allowance must be made for mere negligence].

Lay peers voting on legal questions.—Sir Edward Sugden in his recent work on "*The Law of Property as administered by the House of Lords*," gives an introductory chapter "*on the Jurisdiction of the House of Lords in Appeals and Writs of Error*," in which there is a notice of the instances in which the lay lords have voted or abstained from voting in appeals (see p. 4—31). The cases in which lay peers have attended and voted on law questions, do not exceed eight, some of them cases of fact, or involving a question of public right and importance. *Reeve v. Long* (1 Salk. 227), was the first, and there the judgment was reversed, against the opinion of all the judges, and on general principle and common sense, very properly reversed—it having been decided by the court below, that in the case of a contingent executory limitation, a posthumous son deriving under a will, could not take, where the particular estate determined before he came into *esse*.

The next was that of *Cary v. Bertie* (2 Vern. 333), which was an appeal from the Chancellor, and where there was a limitation over

in the event of the lady not marrying a particular individual within a limited time, which she did not do. The parties interested where both of high birth, and a pamphlet was written against the Chancellor, by Mr. Bertie, the husband of the lady.

The third, *Ashby v. White* (1 Salk 19), was a very proper case for the lay lords to vote upon. The judges were as nearly as possible divided, the question being whether an action on the case would lie against the sheriff, for refusing the vote of a burgess. It was held in the court below it would not, and this decision was reversed.

The next great case was the celebrated Douglas one, where the question was one of legitimacy, purely one of fact, and on which a lay lord was quite competent to form an opinion.

The cases of *Fitzgerald v. Fauconberge*, *Alexander v. Montgomery*, and *Hill v. St. John*, were legal questions, and which probably had been better left to the law lords. The last was that of the *Bishop of London v. Pfyche* (2 Bro. P. C. 211, by Tomlin), where the question arose as to the illegality of a general resignation bond. The House of Lords, contrary to the settled law, and to the opinion of all the judges, on the general question, held such a bond to be illegal. They were, perhaps, right on general principle, but the better course would have been, to have legislated, as they subsequently did, upon the subject, and not to have run counter to the universal opinion of the judges.

The last important general case was that of the *Queen v. O'Connell*, and in that case the lay lords did not vote.

NOTES OF RECENT LEADING CASES.

COMMON LAW.

ALTERATION IN DEEDS. — *Contracts not under seal.* — It was resolved in *Pigott's case* (11 Coke's Rep. 27a), that if a deed after delivery is altered in any material point, whether the alteration be made by the party holding the deed or seeking to enforce it, or by a stranger, the deed thereby becomes void, as against the party fraudulently intended to be affected by the alteration. In the case of *Davidson v. Cooper*, (11 Mees. and W. 799; 12 Law Journ., N. S., Exch. 457; in error, 13 Mees. and W. 342), it was said: "There is no doubt but that in the case of a deed any material alteration, whether made by the party holding it, or a stranger, renders the instrument altogether void from the time when such alteration

is void. This was so resolved in *Pigott's case* (*supra*), and though it was contended in argument that the rule has been relaxed in modern times, we are not aware of any authority for such a proposition when the altered deed is relied on as the foundation of a right sought to be enforced." The same principles apply to the alteration of a written agreement or contract *not under seal*. This has been so decided in several cases, and particularly in a late case in which the Court of Common Pleas, after a lengthened argument, held that a material alteration of a sold note by the buyer, without the privity of the seller, avoids the contract. Also that an alteration in a material part of a written contract, without the consent of both parties, is a material alteration, which avoids the contract, although it may not have altered the duty of the party sought to be charged. In this case the plea stated, that a material alteration had been made in the contract declared on, and proceeded to specify the alterations under a *videlicet*; and at the trial, a different alteration, which was also material, was proved, and no objection was taken on the ground of variance: held, that the plaintiff could not take advantage of the variance in showing cause against a rule nisi for leave to enter a verdict for the defendants. *Seem*, that it was not necessary, under such a plea, to prove the specific alteration alleged; and that, at all events, the judge could have amended the plea at the trial, (*Mullett or Mollett v. Wackerbarth*, 17 Law Journ., N. S., C. P. 47). Mr. J. Williams observed: "The doctrine in *Pigott's case* had been extended to all instruments evidencing contracts; and the effect of the decisions is, that any alteration in a material part of an instrument avoids it. In this case I think that the introduction of the words amounts to a material alteration of the instrument, and the plea is therefore substantially proved." Mr. J. Maule observed: "If we are to confine the rule to those cases only, in which the alteration may vary the situation of parties, in reference to the matter immediately in suit between them, we shall be limiting the law as established by *Pigott's case* and subsequent decisions."

RESTRAINT OF TRADE.—*Unlimited in point of time.*—We have previously (*ante*, p. 33) in treating of contracts in restraint of trade, observed that a restraint of trade is good in respect of extent of place is not invalidated merely because it is indefinite as to time. A case lately reported furnishes us with a precise authority for this proposition. In the case alluded to the Court of Queen's Bench held that an agreement to give up a house and good-will of a business for £7, and not to open a shop in the same line of business within one mile of the said house, under a forfeiture of £20, is not illegal, on the ground that the restraint of trade is unlimited in point of time, and may continue though the purchaser ceases to carry on the business. It was likewise held that the agreement did not require a

stamp, as being for a subject-matter of the value of £20. *Pemberton v. Vaughan*, 10 Q. B. Rep. 87.

SHAREBROKERS.—*Usage of share-market—Re-sale of scrip not taken up by principal—Money paid.*—There have been latterly many cases on the rights and liabilities of persons acting as sharebrokers; in which questions have been raised as to their dealing in scrip as principals and not as agents, and as to their actual principals being bound by the customs of the share-market of the place where the broker transacts business. In *Bayliffe v. Butterworth* (1 Exchq. Rep. 525; S. C. 11 Jur. 1019), the Court of Exchequer held that an action for money paid was maintainable by a sharebroker against his principal, where the former was by the custom of the share-market in which he dealt, obliged to make good deficiencies occasioned by the default of his principal, and that the latter must be considered as dealing with his broker according to the usage of the market; and that a contract according to such usage was equivalent to a request to the broker to pay the deficiency, if the principal failed to do so himself. This case has been followed by the Court of Queen's Bench in *Pollock v. Stables*, 12 Jur. 1043. There it was decided that a party who employs a sharebroker at a particular place, to transact business for him must be taken as dealing with him according to the usage of the share-market at that place; and is bound by it. Plaintiff, a sharebroker at L., bought for defendant, by his direction, ten railway-shares, to be paid for on delivery of scrip. Defendant not being ready to pay when the scrip was delivered to plaintiff, the vendor demanded the money or the scrip of plaintiff, who delivered the scrip back, which had fallen in price; and, according to the custom of the Stock Exchange at L., the vendor sold the shares for the then market price, and called upon plaintiff to pay the difference, which he did, according to the usage: held, that plaintiff might recover money so paid, in an action for money paid to the use of defendant.

EQUITY.

SETTLEMENT.—*Voluntary, void against creditors.*—Most of our readers are aware that by 13 Eliz. c. 5, voluntary conveyances by persons indebted at the time are void as against the party's creditors. In *Townsend v. Windham*, Lord Hardwicke said: "I know no case on the 13th of Eliz. where a man indebted at the time makes a mere voluntary conveyance to a child without consideration and dies indebted, but that it shall be considered as part of his estate for the benefit of his creditors." So the Vice-Chancellor of England has lately held that where a testator had assigned a policy of assurance for the benefit of a female with whom he was cohabiting, the testator being largely indebted at the time of making

the assignment, such voluntary assignment was void against his creditors. *Skarff v. Soulby*, 18 Law Journ., N. S., Chanc. 8.

SPECIFIC PERFORMANCE.—*Sale*—*Lapse of time*—*Laches*—*Possession of property*.—A contract for the sale of the vendor's interest in the manor under a lease for lives, was made on the 16th of October, 1840. Objections were taken to the title, and a correspondence between the solicitors of the vendor and purchaser took place, and continued until 20th of August, 1841, when the purchaser gave notice to the vendor that the title being defective, he rescinded the contract. The correspondence with reference to the title still proceeded (the purchaser's solicitor claiming his right to insist upon the notice, but giving the vendors two months more to complete the title) until the 17th of January, 1842, when the purchaser intimated that he should fall back to his position under the rescinded contract. The bill was filed on the 30th of August, 1843: held, that the interval between the 20th of August, 1841, and the 17th of January, 1842, ought not to be regarded in the question of laches, but that the delay, after the 17th of January, 1842, before the bill was filed, precluded the vendor from sustaining his suit for specific performance. The fact that the purchaser allowed the deposit to remain in the possession of the vendor from the time he (the purchaser) declared the contract to be rescinded, until shortly before the bill was filed, when he brought his action to recover it, did not affect the question of laches. The tendency of the court in modern cases has been to restrict the exercise of its jurisdiction in enforcing specific performance of contracts to those cases in which the plaintiff has been prompt in seeking his equitable remedy. The purchaser being in possession of part of the property under the arrangement, and being advised to rescind the contract, and assert his paramount title to the property, was not bound to give up the possession before he could assert such paramount title by making a formal entry on the property (*Taylor v. Brown*, 2 Beav. 180; *King v. Wilson*, 6 Beav. 124; *Walker v. Jefferies*, 1 Hare, 341; *Watson v. Reid*, 1 Russ. and Myl. 236). *Southcomb v. Bishop of Exeter*, 6 Hare, 253; S. C. 16 Law Journ., N. S., Chanc. 378. V. C. Wigram said: "The fourth question is this—suppose that a good title had not been shown on the 17th of January, 1842, the question then would be whether I could then have disposed of the case. Counsel has argued that if a good title had in fact been shown on that day, the bishop has been in the wrong ever since that day, and the court ought not to dismiss the bill; and that that fact ought to be ascertained. The question on that will be whether I am now to refer it to the Master to inquire whether a good title had been shown on the 17th of January. It appears to me I ought not; I am not bound to accede to that argument. I think that the mere statement by

the party that he has made a good title is not enough. I thought myself bound to attend to the argument on the title, as far as was necessary to satisfy myself that the bishop was not liable; and being well satisfied of that, and, to say the least, being satisfied also that the vendor would have great difficulty in persuading a court of equity to compel a purchaser to accept such a title, I think the case I have before mentioned applies. I think it is not enough for the vendor to say, 'I insist you are bound, and I will enforce it by a bill.' If afterwards he files a bill he cannot by that threat put himself in a better position than if he had acquiesced."

BANKRUPTCY.

ACT OF BANKRUPTCY.—Declaration of Insolvency.—Under the 5 & 6 Vict. c. 122, s. 22, the filing of a declaration of insolvency is of itself a complete act of bankruptcy, without being followed by an advertisement of the same in the Gazette under the 6 Geo. 4, c. 16, s. 6. *Follett v. Hoppe*, 17 Law Journ., N. S., C. P. 76.

Summoning trader — Signing admission.—By sect. 11 of 5 & 6 Vict. c. 110, a creditor of a trader liable to the bankrupt laws may file an affidavit of his debt, and of his having delivered to him particulars of his demand, and a notice requiring payment, whereupon a summons may be issued for a trader's appearance before a commissioner of bankrupts. By sect. 12, the debtor is to state whether or not he admits the demand, and if so, such admission is to be signed by him. Then, by sect. 19, if he do not within fourteen days thereafter pay, or offer to pay the creditor, or secure or compound for the same, he shall be deemed to have committed an act of bankruptcy on the 15th day after the filing of such admission. Sect. 20 has the same provisions in the case of an admission of part of the demand, with the addition, that as to the part not admitted, if the debtor do not pay, secure, &c. same, or enter into a bond, with two sureties, to pay such sum as may be recovered in an action, he shall be deemed to have committed an act of bankruptcy. In a late case it was held, that if a trader, summoned by his creditor under sect. 11, and being indebted to him in £149 4s. signs an admission that he is indebted to such creditor in £149, and, therefore, has nothing to show that the 4s. was intentionally omitted, such trader does not commit an act of bankruptcy if he omits to perform anything required by s. 13 (which applies to a debtor not attending the summons, or attending and not admitting the demand, or deposing to a good defence, and not paying, securing or compounding for such demand within fourteen days,) or by sect. 15 from parties refusing to admit debts on summons, or admitting them in part (*Pennell v. Rhodes*, 9 Q. B. Rep. 213). In the same case it was held, that if

the trader having, on summons, given an admission according to the 5 & 6 Vict. c. 122, agree with a creditor to deposit bills with him as a security, and submit to the judge's order for the payment of the debt by instalments with such terms as the creditor is satisfied, no act of bankruptcy is committed, though more than fourteen days elapse between the filing of the admission and the day appointed for fulfilling the stipulated terms, provided the agreement itself be made within the fourteen days; for in such case, the trader has compounded for the demand in due time, to the satisfaction of the creditor, within the meaning of the 14th section of the act. This case is also reported in 15 Law Journ., N. S., Q. B. 52, and 10 Jur. 825.

CRIMINAL LAW.

LARCENY.—*Bailment, determination of.*—A. having become a bailee of B.'s mare, took her to a livery stable, and paid B. a balance due to him, after deducting certain expenses, and B. ordered the stable-keeper not to let A. have the mare again; and on A. asking to be allowed to ride the mare to a certain place, twice told him never to put a finger near her mare. A. made no claim of lien or property in the mare, but at a later period of the same day obtained her, by a false story, from the ostler at the livery stables, and sold her: held, by the judges on a case reserved, that there was evidence to go to the jury, that after the bailment was ended, a change of possession had taken place, after she had been left at the stables, and that the stable keeper had become B.'s agent; and that A. was rightly convicted of larceny. *Reg. v. Steer* (18 Law Journ., N. S., M. C., 50). *Per Parke, B.*: "I do not enter into what was done before the mare was put into the stables, and I suppose it to have been put there by the prisoner. It is quite clear that the bailment was subsequently determined by the prosecutor, with the full consent of the prisoner. The effect of that was to make the livery stable keeper's possession the same as if the mare had been originally bailed to him by the prosecutor. That being so, the prisoner went with a false story and got the mare."

CONVEYANCING.

ANNUITY.—*Requisites of memorial—Consideration.*—The 53 Geo. 3, c. 141 enacts, that within thirty days after the execution of every bond, &c., whereby any annuity or rent-charge is granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, a memorial thereof shall be enrolled in Chancery, which amongst other particulars must specify the pecuniary consideration for granting the same, and the annual sum to be paid. Where the memorial does not set forth

with precision the form in which the consideration is paid, it is void (*Lewis v. Hooper*, 4 Nev. and Man. 318; S. C. 2 Adol. and Ellis, 135; see as to the proper description, *Morris v. Jones*, 2 Barn. and Cres. 232; *Faircloth v. Gurney*, 2 Moo. and Sc. 822; S. C. 9 Bing. 456; 1 Dowl. 724; *Wood v. Perrott*, 5 Moore, 63). In a recent case, V. C. Wigram held that the enrolled memorial of an annuity deed must state the amount of consideration paid for the annuity, and whether paid in cash or notes, &c.; but it need not go on to state that part of such consideration was applied in paying off a prior annuity or other charge. *Moody v. Hebberd*, (17 Law Journ., N. S. Chanc. 381; S. C. 12 Jur. 495). The Vice-Chancellor after distinguishing the case of *Duke of Bolton v. Williams* (4 Bro. C. C. 97; S. C. 2 Ves., Jun. 138), as decided on an old statute which required that the memorial should show, not only how the money was paid, but to whom, whereas the 53 Geo. 3, c. 141, did not require this, proceeded: "I entirely adopt Sir Edward Sugden's observation on the statute (3 Vendors, App. 4) that the party having truly stated upon the memorial how much of the consideration was paid in notes and how much in cash, has done all that the act requires; and that he is not bound to go on and state that the money advanced by him was applied to extinguish a prior annuity."

DEVISE.—*Fee simple*—*Legal and equitable estates.*—A testator devised and bequeathed his real and personal estate to his wife and three other persons, and their heirs, executors, &c., for ever, upon trust for his wife to receive the rents for life; and after her decease, upon trust "to pay and divide the rents among his children as they attained twenty-one, and, after their decease to pay the principal of their respective shares unto their legal representatives, their executors, administrators and assigns. He gave power to the trustees to sell, with power of maintenance out of the rents, and advancement out of the principal of their share; and in case any of his freehold estates should not be sold by his said trustees, then, from and after the decease of his said children, he devised the same unto their respective heirs and assigns as tenants in common. And he directed that the receipts and conveyances of his said trustees to any purchasers of any part of his estate and effects should be good discharges and assurances. Held, that the trustees took the legal fee, and that the children were entitled to equitable estates for life, with equitable remainders to their heirs, which, united, gave them equitable estates in fee simple. *Reynell v. Reynell*, 10 Beav. 21.

Estate for life or in tail.—In *Gretton v. Howard* (1 Meriv. 448), there was a devise to testator's wife, and after her decease to the heirs of her body, share and share alike; and in default of issue, to be lawfully begotten by him, to be at her own disposal. A. died leaving six children by his said wife. It was held that the wife took

an estate for life only; and that each of the six children took an estate in fee simple in remainder, expectant on the determination of the mother's life estate, in one sixth part, as tenants in common. This decision was not considered a satisfactory one (see Jarman on Wills, 96), and the following case over-rules it. In this last case there was a devise and bequest of residuary real and personal estate to the testator's son, and the heirs of his body for ever, and in case the son should die without children, the whole to be divided amongst the testator's surviving grandchildren, share and share alike. The son takes an estate tail in the freehold part of the property. *Abram v. Ward*, (6 Hare, 165). Wigram, V. C. observed, "that the devise to the son and heirs of his body, supposing there was nothing in the will to control those words, clearly gave him an estate tail. But it was argued that the words "heirs of his body," must, with reference to the subsequent words, be read as "children." If that were all the court had to do, the case would not be altered, for it would stand thus:—a devise to the son and his children for ever, and if he die without children, then over. In that case the gift would be an estate tail. It was further argued that the court must modify the will, and reduce the estate of the son to an estate for life, with remainder to his children. Is there any ground for so reducing his estate? In all the cases cited except *Gretton v. Hayward*, there was an express estate for life, remainder over, and the court held in those cases that the superadded words were words of purchase. As no express estate for life is given, there is no reason for cutting down the son's estate to one for life only."

Issue—Estate for life—Estate tail by implication.—A. being seised in fee, devised one moiety of his estate to his sister M. for life, remainder to her first and other sons in tail male, and for want of such issue, remainder to her issue female, and the heirs of their body, with power to M. to charge £1000 for younger children, and for want of such issue, remainder to his sister I. for life, with precisely similar remainders to her issue. The other moiety was limited to I. for her life and to her issue, and then to M. and her issue, in precisely the same way as the first moiety; and for want of issue of M. and I. the whole to L. for life, with remainders over. By codicil reciting the marriage of M. and D. he devised one moiety to M. for life, remainder to the issue of M. successively, and the heirs of their bodies, "as in said will limited, and for default of such issue to D. for life with remainders over, as in said will limited." The codicil contained the following clause: "I ratify my will with respect of my real estate in every particular not hereby altered; the only alteration I intend hereby is, that if my sister Margaret should die without issue, or failing issue, that the said D., her husband, or any husband she may have, should hold a moiety of my estate during his

life." M. after the death of D. suffered a recovery to the use of herself, her heirs and assigns for ever :—Held, that under the limitations in the will, M. took only an estate for her life, and that she did not take an estate tail female, after the estate in tail to her first and other sons. Held, also, that from the words, "in default of such issue to C.," &c., in the codicil, there was no ground for implying an estate tail in M., the word "such" being referential to the devise in the will of her sons in tail male, and her daughters in tail general. Held, also, that the devise in the codicil to D., or any future husband of M. should die without issue, or failing issue, was to take effect on the determinations in the express limitations in the will to M.'s first and other sons in tail male, and to her daughters in tail general, and not on a general failure of M.'s issue, and that, therefore, M. did not take an estate tail by implication. *Hamilton v. West* (10 Irish Equity Rep. 75). It was argued in the first place that M. took an estate in tail female, under the limitations in the will in remainder after the estate in tail male to her first and other sons. And it was contended, says the Master of the Rolls in his judgment, "that if an estate be devised to A. for life, with remainder to his issue male, A. will take an estate in tail male : so, if an estate be devised to A. and his issue female, he will take an estate in tail female. If in the former case words of limitation are superadded, A. will still take an estate tail. Thus in *Roe v. Grew* (2 Wil. 322), where an estate was devised to G. for life, remainder to the male issue of his body, and the heirs male of the body of such issue male, it was decided that G. took an estate tail ; and in *Hodgson v. Merest* (9 Price, 555), where the devise was to A. for life, remainder to his issue and to the heirs of the bodies of the issue, it was decided that A. took an estate tail ; and it has been argued that if the words of limitation superadded to a devise to A. and his issue male are to be rejected, and that A. will, notwithstanding, take an estate in tail male ; so in this case of a devise to M. for life, remainder to her issue female, and the heirs of their bodies, the superadded words of limitation should be rejected, and in such case M. took an estate in tail male. I think this argument not well founded." His honour then cited *Fearne's Rem.* p. 183, and *Jarman on Wills*, vol. ii. p. 276, where it is observed, "If the superadded words of limitation operate to change the course of descent, they will convert the words on which they are engrafted into words of purchase, as in the case of a devise to a man for life, remainder to his heirs and the heirs female of their bodies : and the same principle of course would apply where a limitation to the heirs male of the body is annexed to a limitation to the heirs female, and *vice versa*, but the books contain no such case, and the doctrine rests entirely on the position argued by Anderson in *Shelley's case*, which, however, has been since much cited and re-

cognised." The Master of the Rolls said:—"I am therefore of opinion that, under the limitation, M. took an estate for life, with remainder to her first and other sons in tail male, with remainder to her daughters in tail general, with remainder to J. for life, with remainder to her first and other sons in tail male, with remainder to her daughters in tail general; and all the limitations previous to the limitations to the daughters of J. in tail general having failed, the plaintiff would be clearly entitled, under the limitations, to the moiety of the lands in defendant's possession." As to the devise in the codicil to D. or any future husband, the Master of the Rolls said: "I have already shown that the first devise by the codicil to D., the then husband of M. was to take effect in default of *such* issue, i. e., referring to the devise to the sons in tail male, and to the daughters in tail general; and that this express devise to him being on the failure of the issue previously mentioned, there is no ground for implying an estate tail in Margaret. The subsequent language, according to the defendant's argument, would have the effect of giving to D., by the last clause in the codicil, an estate for life after a general failure of issue of Margaret, where the provision, a few lines before, was upon failure of the express limitations to the sons in tail male, and the daughters in tail general. This would be a most unreasonable construction to put upon the codicil." His Honour then fully noticed *Graves v. Hicks* (5 Adol. and Ellis, 38; S. C. 11 Sim. 548); *Blackbörn v. Edgely* (1 P. Will. 606); *Morse v. Lord Ormonde* (1 Russell, 404), and *Ellicombe v. Gompertz* (3 Myl. and Cr. 151, 154), and proceeded: "Mr. Jarman (2 Wills, 398), submits several deductions as deducible from the cases. The second proposition is this: that the words, "*in default of issue*, or expressions of a similar import, following a devise to all the sons successively in tail male, and daughters concurrently in tail general, are to be considered such issue, even in the case of an executory trust." If this proposition is correctly laid down as the result of the cases, it decides the present case in favour of the plaintiff. I am, however, disposed to think that the proposition is too broadly stated by Mr. Jarman. The true principle upon which cases of this kind should be decided is laid down by Lord Cottenham in *Ellicombe v. Gompertz* (*supra*)."

HUSBAND AND WIFE. — *Separate estate* — *Dispensing with husband's concurrence in conveyance.* — The court refused, in 1847, to dispense with the concurrence of a husband, under the 3 & 4 Will. 4, c. 74, s. 91, upon an affidavit merely stating that he entered a government steamer in January, 1844, and that the last the wife had heard of him was, that in January, 1845, he was on board another government steamer at New Zealand, and that she believed it was his intention never to return. *Ex parte Gilmore*, 3 C. B. 967.

RESIGNATION BONDS.

Covenants or bonds for resignation of benefices are, or formerly were, either general or special. A general covenant or condition of a general resignation bond is that the incumbent shall resign upon request; whilst the special covenant or the condition of a special resignation bond is that the incumbent shall resign in favour of a certain person, or of one out of several persons, when that person shall be capable of being presented to the benefice.

The question whether a resignation bond be good or illegal depends upon this: does it corruptly secure a benefit to the patron; in other words, was it a benefit given to the patron as the price of the presentation? If so, then clearly the bond is illegal.

The tendency of the early cases was to support the validity of both general and special bonds of resignation. Thus Ryder, C. J., in *Heakett v. Grey* (3 Burn's Eccl. Law. 623) says: "As to the point whether a general bond of resignation is good, we are all of opinion it is." So in the case of *Peele v. Carlisle* (Stra. 227), in an action of debt upon a bond conditioned to resign a benefice, the Court of King's Bench refused to let the defendant's counsel argue the validity of such bonds, "they having been so often established even in a court of equity." And even after general bonds were decided to be illegal, it was considered that special bonds of resignation were valid.

General bond of resignation invalid.—The case deciding upon the illegality of a general bond of resignation was that known as *Ffytche's case*, or the *Bishop of London v. Ffytche* (reported in *Cunningham's Law of Simony* and in 3 Burn's Eccl. Law, 625, last edit.). It appeared that in 1780, the rectory of the parish church of Woodham Walter in Essex, in the diocese of London, becoming vacant, Mr. Ffytche presented his clerk, J. Eyre, to the bishop for institution. The bishop being informed that J. Eyre had given his patron a bond in a large penalty to resign the said rectory at any time upon request, and the said Eyre acknowledging that he had given such bond, the bishop refused to institute him to the living; whereupon Ffytche brought a *quare impedit* against the bishop in the Court of Common Pleas, and obtained judgment against him. Upon which the bishop appealed to the Queen's Bench, and that court also gave judgment in affirmance of the judgment of the Court of Common Pleas. Upon this the bishop appealed to the House of Lords, where the substantial question put to the judges was this: whether an agreement made between an incumbent and patron, whereby the incumbent undertakes to avoid the benefice at the request of the patron, be not an agreement for a

benefit to the said patron within the stat. of 31 Eliz. c. 6, so as by reason of such agreement such presentation shall be void? It was decided by a majority of the lords, but in opposition to the opinion of the majority of the judges, that general bonds of resignation were illegal. One ground urged by Lord Thurlow was public policy. The determination was that general bonds of resignation *before presentation* produce a benefit to the patron, which, therefore, constituted the transaction a simoniacal one within the 31 Eliz. c. 6 (see *ante*, p. 57). The only judge who gave a decided opinion against the legality of the bond was B. Eyre, who said: "The statute of Eliz. c. 6, was made to enforce a very clear rule in the ecclesiastical law, that presentations ought to be spontaneous. The words of the statute are, 'reward, gift, profit, or benefit.' Is the possession of a resignation bond a *profit or benefit* to a patron? In every article in which the patronage is valuable it is marketable, and by that the bond becomes instantly more valuable and more marketable. In a word, he that stipulates for a resignation bond, bargains for a sum of money, or for that which to him is as valuable, or perhaps more valuable, than that sum of money. Either of these is *beneficial* to him; both of them, therefore, equally forbidden by the statute."

As we have before stated, the ground of the decision in *Ffytche v. Bishop of London* was that such a bond was simoniacal as against the stat. of 31 Eliz. c. 6, and not that it was contrary to the general principles of the common law. Hence, notwithstanding this decision in the House of Lords, the judges afterwards, in cases to which the statute against simony did not apply, considered themselves as bound by prior authorities (see *Bagshaw v. Bossley*, 4 Term Rep. 78; *Partridge v. Whiston*, *Id.* 359). Therefore it was holden that a bond given by a schoolmaster of an ancient public school to resign at the request of his patron was good (*Legh v. Lewis*, 1 East's Rep. 391; 3 Bos. and P. 231). Lawrence, J., however, entertained considerable doubts upon the question, influenced as it appears by the arguments which had prevailed against the validity of general resignation bonds by clergymen (see 8 Ves. 61).

Special or particular resignation bonds.—For a long time, and even after the above case of *Bishop of London v. Ffytche*, it was contended that if the bond to resign were in favour of a certain person or of one of two persons, it would be good. This was the opinion of the judges in *Newman v. Newman* (4 Mau. and Selw. 66), which, however, was decided on another ground. The bond was conditioned for the performance of an agreement to this effect: that if certain livings belonging to the estate (settled in favour of the defendant) should become vacant during the lives of the defendant and his younger brother, the defendant should present his brother, if then qualified, or, if not qualified, should present some other person *ad*

interim, and procure such incumbent to resign on the defendant's receiving notice of his brother's qualification. To debt on the bond, the defendant pleaded it was simoniacal. The court, on argument of a demurrer thereto, seemed to distinguish this case from *Bishop of London v. Ffytche*, since this was not a *general* bond of resignation. Lord Eldon in several cases (see 8 Ves. 60; 1 Jac. and W. 283; 18 Ves. 37) said it would be very difficult to reconcile the distinction between general and special bonds, so that the former should be bad and the latter good; he added, however (18 Ves. 37), "reasonable caution requires a court of equity not hastily to pronounce bad a bond understood to be good at law."

In the year 1826, the question whether or not there was any substantial difference between general and special bonds of resignation in favour of any particular person was raised in the case of *Fletcher v. Lord Sondes* (3 Bing. 501; S. C. 1 Bligh, N. S. 144). In this case it appeared that Fletcher had given a bond to the patron of the living, Lord Sondes, in the penal sum of £12,000. The declaration did not set out the condition, but Fletcher having suffered judgment, Lord Sondes made a suggestion under the 8 & 9 Will. 3, c. 11, s. 8, setting out the condition, which commenced with a recital that the obligee, Lord Sondes, was the patron of the rectory of K., which rectory was then vacant; that Lord Sondes had by writing under his hand and seal presented Fletcher, the obligor, to supply the vacancy, and that Fletcher had agreed to resign upon request so as that the rectory might become vacant, *for the sole purpose that the owner of the advowson might be enabled to present thereto anew either one of two brothers of Lord Sondes, Henry Watson or Richard Watson*, when the party to be presented should be capable of taking an ecclesiastical benefice. It then assigned as a breach that Henry Watson became capable on the 11th of October, 1820, that thereupon Lord Sondes requested Fletcher to resign, but that he refused so to do. Upon this suggestion a writ of inquiry was executed before the chief justice, and a special jury assessed the damages at £10,000, for which judgment was entered. Upon this judgment Fletcher brought a writ of error in the Exchequer Chamber, where judgment was affirmed without argument. Fletcher then brought a writ of error before the House of Lords. Nine of the judges delivered their opinion, three in favour of the bond and six against it. Subsequently Lord Eldon delivered the decision of the House that the bond in question was void, and that the judgment of the court below should be reversed; he being of opinion that the decision in *Bish. London v. Ffytche* governed this case.

The effect of this decision was entirely to take away the distinction which had been thought to exist between general and special resignation bonds, and to place them on the same level, by declaring them equally illegal and void.

One or two points have been raised which it may not be without use to mention. Suppose the agreement were that the presentee should resign conditionally, that is, provided only that the bishop should accept his resignation, would this be valid? Clearly it would not; and indeed it would introduce another difficulty, for it is undoubtedly good law that the resignation must be pure, absolute, and unconditional. At p. 167 of 1 Bligh. N. S., however, it appears that some of the judges inclined to support such a bond.

Again, it being held that the bond was nothing but a *general* bond, and, as we have before stated, such a bond being held void only (according to the general opinion) as corruptly securing a benefit to the patron, could a bond to resign in favour of a specified individual, or one of two specified individuals, be held to be void as being a corrupt benefit to the patron? The patron could not sell, as a particular individual was indicated, but still there was an original bargaining, which vitiated the transaction (see also the 7 & 8 Geo. 4, c. 25, *infra*). The Chief Justice of K. B. in 1 Bligh, N. S., 243, said: "I consider the bond now in question to differ from the general bond in degree only, and not in principle or kind." Lord Eldon (pp. 251, 252) proceeds to show that under cover of these bonds all sorts of evasions might be effected.

Bond after presentation.—The whole doctrine rests on this: that the bond was given as the price or consideration of the presentation; but suppose the bond were given after the presentation, and without any previous agreement; in this case there would be no simony. The resignation cannot in such a case be considered as part of the price for the presentation, as the benefit of it is given subsequently. But we must enquire whether such a contract is open to any other objection, as on the ground of public policy. The question is this: whether the bond be not illegal at common law, as converting into an estate at will, or at least as determining by act of the patron, an office which the law considers to be a freehold in the incumbent. In other words, does the bond give such a jurisdiction to the patron as to conflict with the ordinary rule of law, by giving the patron a right to interfere with the incumbent to the detriment of the ecclesiastical courts (see *per* Lord Thurlow in 3 Burn's Eccl. Law, 632; and *per* Lords Tenterden and Eldon, in *Fletcher v. Lord Sondes*, 1 Bligh, N. S., pp. 243, 244, 251; also 8 Ves. 61). Lord Tenterden says, *Flytche's* case may be put upon the bond's being within statute of Eliz., or "that the effect of the bond was to convert into an estate at will an office which the law considers to be a freehold, and so the bond is void at common law." So Lord Eldon (p. 251, 1 Bligh, N. S. 251) says: "There are a great many other provisions in what are called special bonds, some very provident and commendable; but whether they are as clearly legal may admit of question, more espe-

cially if they give a sort of jurisdiction to a patron which the law has vested only in the ordinary." These are very considerable authorities that such a provision would be bad.

Bonds by clergymen for other objects.—We are not to conclude that bonds conditioned to do things which are the subjects of ordinary ecclesiastical jurisdiction, are therefore necessarily void; for a bond to keep a glebe in due repair would not be invalid. So if in performance of any other ecclesiastical duty (see *Bagshaw v. Bosaley*, 4 Term Rep. 78; *Partridge v. Whiston*, 4 Term Rep. 369). These decisions, so far as they depend upon the above points, are not to be considered as over-ruled. Indeed, Lord Eldon said: "such bonds are in furtherance of the law, not in contravention of it" (1 Bligh, N. S. 53).

We may also observe that any corrupt agreement for taking holy orders is within the policy of the law and void. Thus if a father agree to pay an annuity till the son be in possession of a living of a certain value, and the son agree to accept holy orders, it would be simoniacal. (*Kircudbright v. Kircudbright*, 8 Ves. 53, 60). The Lord Chancellor expressed a strong opinion, that upon grounds of public policy, by the effect of the agreement, the transaction was illegal; but the decision went upon the ground, that the son had not complied with the condition, having received the annuity nine years, and being still only in deacon's orders, and that the annuity was determinable.

There are strong grounds to suppose that a bond by which one person engages to procure patronage for another is simoniacal, but the point is not settled. *Ld. Eldon*, in 8 Ves. 53, 60, said: "another objection to this bond is, that the father is put under these circumstances, that he is to solicit the benefit of patronage for this pecuniary consideration moving from himself; the policy of the law, supposing the patron to look out for persons, the best that can be recommended to him; which excludes pecuniary considerations."

7 & 8 Geo. 4, c. 25.—In order to prevent the infliction of penalties to which parties had exposed themselves, very soon after the decision in *Fletcher v. Lord Sondes*, the 7 & 8 Geo. 4, c. 25, was passed. This act, after reciting the 31 Eliz. c. 6, and that since the passing of the act a practice had generally prevailed of giving and taking special bonds, &c., for resignation of spiritual offices, and reciting also that it had been adjudged that such engagements came within the intent and meaning of the statute of Elizabeth, and that the parties thereto would suffer great hardship unless they were relieved from the penalties to which they had erroneously, but not wilfully, become liable, enacted that no presentation to any spiritual office should be void on account of any agreement to resign when some person specially named, or one of two persons

specially named, should become qualified to take the office, and that the parties to the agreement should not be subject to any penalties on account of the agreement; that (by sect. 2) engagements made before the 9th of April, 1827, for the resignation of any benefice, &c., in favour of some person specially named, or one or two persons so specially named, when such person or persons should become qualified, should be valid; provided by sect. 3 such engagements were *bond fide*; and that it should not be compulsory on the ordinary to accept the resignation: and further (by sect. 4), if the person specially named were not presented within six months, then the resignation was to be void. In the following year (28th July, 1828) an act (9 Geo. 4, c. 94) was passed for rendering valid bonds, covenants, and other assurances, for the resignation of ecclesiastical preferments in certain specified cases. The material provisions of this statute are, that the engagement must be *bond fide*,—the purpose must be manifested in the terms of the engagement; the engagement must be entered into before the appointment to the benefice; and the resignation must be in favour of any one person named and described, or of one of two persons named and described, each of whom shall be, either by blood or marriage, an uncle, son, grandson, brother, or nephew, or grand-nephew of the patron or one of them not being merely a trustee of the patron, or of one of the persons for whom the patron is trustee, or of the person by whose appointment the presentation is made, or of any married woman whose husband in her right shall be patron, or one of the patrons, or of any other person, in whose right the presentation is made. And further (sect. 4), the instrument, by which the engagement was entered into, must be deposited within two calendar months next after the date in the office of the registrar of the diocese wherein the benefice is locally situate, and shall be open to inspection, and an office copy thereof shall be admitted in evidence. The resignation (sect. 5) must refer to the engagement in pursuance of which it is made, and must state the name of the person for whose benefit it is made; and such person must be presented within six calendar months after notice of the resignation. This statute, however, is confined to such persons (sect. 6) only as are entitled to the patronage of the spiritual office as private property. It does not extend to cases where the presentation, &c., is made by the King in right of his crown, or the duchy of Lancaster, or by any ecclesiastical person, in right of his office or dignity, or by any other body politic or corporate, or by any other person in right of any office or dignity, or by any company, or any trustees, for charitable or other public purposes.

It will be seen that the retrospective statute applies to presentations before the 9th of April, 1827, and that the later act which is prospective only, takes effect from the 28th of July, 1828. There

is, therefore, an interval during which bonds are open to the objection settled by the case of *Fletcher v. Lord Sondes*. During that time *all* bonds were void, whether general or special.

STATUTE OF LIMITATIONS.—TRUSTS.

In the *Irish Jurist* (No. 19) is a very good article upon the effect of devises for payment of debts on the statute of limitations, from which we extract the following :—

“There have been some very important decisions recently made in this country as to the exemption from, or operation of, the statute of limitations, 3 & 4 Will. 4, c. 27. We allude particularly to the cases of *Hunt v. Bateman* (10 Ir. Eq. Rep. 360), *Dundas v. Blake* (1 Ir. Jurist, 121), and *Bennett v. Bernard* (1 Ir. Jur. 145).

“The two former arose on the effect of a trust in a will, and the latter on the pendency of a suit, as preventing the bar of the statute.

“Immediately after the passing of the act, courts of equity appear to have struggled against its applicability to cases of general trusts created by wills; nor was the distinction very well defined as to what cases were within the saving of the 25th section, and what without the bar of the 40th. The words of the latter appeared sufficiently explicit, ‘no action, or *suit*, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of, any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of the same.’ The saving in the 25th was confined to cases where ‘land or rent was vested in a trustee upon any express trust.’ On these two sections an infinite number of decisions have been made.

“The first case in Ireland was that of *Knox v. Kelly* (6 Irish Law Rep. N. S. 222). There the testator directed his debts to be paid, and, subject thereto, devised his real estate. It did not appear that there was any interposition of trustees between the creditor and devisee; ‘no vesting of land or rent in a trustee upon any express trust.’ The will was in 1810; the debt created in 1791, no payment subsequently to 1796, and the application in 1837. Sir Michael O’Loghlen held the debt not barred, and desired ‘it might be distinctly understood that he rested his decision entirely upon the trust in the will.’ And this decision was followed by Lord Plunket in *Dillon v. Cruise* (3 Ir. Eq. Rep. 70); where the devise was to beneficial owners, subject to the payment of his just debts, *which the*

testator directed to be paid in the first instance. No interposition of trustees, no vesting of land or rent in a trustee upon any express trust. The Chancellor, however, was of opinion that there was an express trust created by the will, not a mere general charge, but a devise upon the condition of paying the debts, and he held that the case was not governed by the statute of limitations, and that the law was on the same basis as it had been prior to the passing of the act. Although there were other circumstances in each case, yet the principle to be extracted is as we have stated it.

"These were strong decisions, for it was not very easy to understand how the latter case did not range within the 40th section. It was a suit to recover a sum of money secured by judgment charged upon, or payable out of, land. And it was tolerably clear that it was not within the saving of the 25th section, as that applied to land, not to a gross sum of money charged on land.

"We have stated these cases particularly, because we think they may now be considered as virtually over-ruled. The first blow struck at their authority was by the present chief justice, when Master of the Rolls, in the case of *Knox v. Kelly* (6 Ir. Eq. Rep. 279). That case was undistinguishable from those we have stated, except that the demand was for a legacy, not a debt, and this in fact constituted no solid ground of distinction. It was there held that the legacy was within the 40th section, barred by it, and not saved by the trust created by the will.

"The cases under discussion were further undermined by decisions of Sir E. Sugden and Sir James Wigram, who decided that where estates are in the hands of a beneficial devisee, subject to the payment of debts, there is a liability—not a trust—created, and that the creditor will be barred if he does not pursue his remedies before the time given by the statute has elapsed (*Hughes v. Kelly*, 3 Dru. and War. 48; *Harrison v. Duigenan*, 2 Dru. and War. 295; *Francis v. Grover*, 5 Hare, 1).

In *Hunt v. Bateman* (10 Ir. Eq. Rep. 360) the question was very carefully considered; and there, though more than thirty years had passed without any payment of principal or interest, or any acknowledgment of the debt, it was held not barred. But the distinction between that case and those we have adverted to, and on which the decision was made to turn, was this, that where estates are conveyed to trustees, and they stand between the creditor and the beneficial owner, so long as the estate remains in their hands, the trust remains and the debt subsists; but the learned judges were of opinion, that where there was a general charge created, and the lands were in the hands of a beneficial owner, no trust would be created, so as to prevent the bar of the statute.

"It may with fairness be contended that where the legal estate is

in the hands of trustees the cases range within the 25th section of the act; but Mr. Baron Lefroy did not rest the decision on that, and conceived such cases entirely out of the operation of the statute.

"The point was fairly raised in *Dundas v. Blake* (1 Ir. Jur. 121). On reference to the report it will be seen that the trust created by the will was general, and that the lands, without the intervention of trustees, was given to the devisees beneficially. Counsel for the plaintiffs pressed very strongly upon the court that the distinction taken in *Hunt v. Bateman* was not justified by authority or principle—that a court of equity only looked to the intention of the testator, and that it was perfectly immaterial, in that view, in whose hands the estates were; if in the hands of the beneficial devisee, he was, by the will, constituted a trustee—that if the same instrument gave the benefit, it gave the burthen likewise—that a court of equity would not permit him to retain the former and divest himself of the latter—that the distinction was more one of words than substance; and it was asked, how could it be maintained that the debt was saved where the legal estate was in the hands of a naked trustee who never acted, and barred in those of the man in whom the testator reposed personal confidence, whose conscience was directly affected with the trust—that, so far as the creditor was concerned, the trust was raised whether with or without an intermediary; and it was urged that the case was within that class defined by Baron Lefroy, and expressly within the authority of *Dillon v. Cruise*. His lordship, however, decided against the plaintiffs, and was of opinion that a devise, subject to the payment of debts, did not constitute the devisee a trustee, so as to take the case out of the operation of the statute; and seemed to think that the Court of Exchequer thought the law more settled than it really was in cases apparently within the 25th section.

"The effect of this decision is obviously of great importance, for we suppose it may be now considered as settled—if any question is ever to be so treated which has arisen under the statute of limitations—that a general charge created for the payment of debts, where the estate is given directly to the devisee, will not prevent the bar of the statute.

CASES OVER-RULED, DOUBTED, ETC.

{Continued from p. 8.}

Attorney-General v. Earl of Stamford (1 Phill. 737), as to rights of charity trustees of corporations, observed on in *Attorney-General v. Corporation of Ludlow* (2 Phill. 685).

Baker v. Hanbury (3 Russ. 340), as to devise to tenant for life, remainder to next of kin, lapse by death of tenant for life before testator, dissented from in *Edwards v. Saloway* (2 Phill. 625; S. C. 12 Jur. 487).

Barton v. Jayne (7 Sim. 24), as to suits by uncertificated bankrupts said to be over-ruled, *ante*, p. 68.

Bentham v. Wiltshire (4 Madd. 44), as to power of sale by executors where not named, disapproved of in *Forbes v. Peacock*, 12 Sim. 528; S. C. 13 Law Journ., N. S., Chanc. 46.

Burke v. Lidwell (1 Jon. and Lat. 703), as to security for costs where plaintiff's claim affected by champerty, statute of limitations, or plaintiff poor, &c., commented on in *Worrall v. White* (3 Jones and Lat. 513).

Burkitt v. Ransom (2 Coll. 536), as to costs where testator's estate insufficient to pay debts, disapproved in *Weston v. Clowes* (15 Sim. 610).

Carter v. James (13 Mees. and Wels. 137; S. C. 8 Jur. 912), as to admissions on record not estopping in subsequent proceedings, doubted by Parke, B., in *Hutt v. Morrell*, 13 Jur. 215.

Challenger v. Sheppard (8 T. R. 597), as to devise to *cestui que trusts* without any limitation, passing an equitable fee, commented on and followed in *Moore v. Gleghorn* (12 Jur. 591).

Christian v. Corren (1 P. Wms. 359), as to common law right of subject to appeal to Crown, notwithstanding a charter, observed upon in *Reg. v. Alloo Paroo* (5 E. F. Moo. 11 Jur. 857, 296; 3 Moo. Ind. App. 488).

Church v. Edwards (2 Bro. C. C. 180), as to lands by descent from different ancestors, &c., approved of in *Wolcott v. Bloomfield*, 4 Dru. and Warr. 211.

Crosby v. Middleton (Prec. Chanc. 309), as to party to bond not liable at law being so in equity, observed upon in *Squire v. Whitton* (13 Jur. 125).

Flight v. Bentley (7 Sim. 149), as to equitable mortgagee by deposit of lease taking assignment, observed upon in *Moore v. Greg* (12 Jur. 952).

Gretton v. Hayward (1 Meriv. 448; Jarman on Wills, 96), as to life estate in devise, said to have been over-ruled, *Abram v. Ward* (6 Hare, 165; *ante*, pp. 81, 82).

Hall v. Hugonin (14 Sim. 495; S. C. 10 Jur. 940), as to disposition of wife's reversionary interest by attempted merger, and similar cases, over-ruled in *Whittle v. Henning* (12 Jur. 1079).

Hardwick v. Thurston (4 Russ. 380), as to devise to tenant for life, remainder to next of kin, and tenant for life dying before testator, followed in *Edwards v. Saloway* (2 Phil. 625; 12 Jur. 487).

Hays v. Bailey (3 Sugd. Vend. and Purch. 4), as to portions for infant children observed upon in *Leech v. Leech* (2 Dru. and Warr. 568).

Howell v. Young (5 Barn. and Cr. 259), as to statute of limitations operating from the act of negligence, not from the time of damage resulting, acted on in *Smith v. Fox* (6 Hare, 386; S. C. 17 Law Journ., N. S., Chanc. 170; 12 Jur. 130).

Page v. Adam (4 Beav. 269), as to power of sale by executors and trustees, disapproved of in *Forbes v. Peacock* (12 Sim. 528; S. C. 13 Law Journ., N. S., Chanc. 46).

Sandys v. Long (2 Myl. and Ke. 487), as to misdescription in bill and security for costs, observed on in *Hurst v. Padwick* (12 Jur. 21; S. C. 17 Law Journ., N. S., Chanc. 169).

RECENT STATUTES (11 & 12 VICTORIAE).

[Concluded from p. 67.]

Oaths in Chancery—Crown and Government Security Act—Proclamations on Fines—Debts out of Real Estate—Rates by Parliamentary Electors—Parish Debts—Petty Bag Offices, &c., in Chancery—Charges for Relief of Poor in Unions, &c.

Officers in Chancery administering oaths and declarations. CHAP. 10.—By this act the Clerk of Inrolments and Clerks of Record and Writs may take declarations in lieu of oaths, and the clerk of affidavits and assistant clerks are empowered to administer oaths and take declarations. Provision is also made for filling up vacancies in office of Second Assistant Clerk of Affidavits.

Crown and Government Security Act. CHAP. 12.—This act, after repealing the 36 Geo. 3, c. 7, and 57 Geo. 3, c. 6 (except as to offences against the person of the Sovereign) enacts that if any person shall compass, imagine, or intend to deprive or depose the Queen, her heirs, or successors from the style, honour, or royal name of the Imperial Crown of the United Kingdom, or of any other of her Majesty's dominions and countries, or to levy war against her Majesty, within any part of the United Kingdom, in order by force or constraint to compel her to change her measures or counsels, or in order to put any force or constraint upon, or in order to overawe Parliament, or to move or stir any foreigner or stranger with force to an invasion, and such compassings, &c., shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed, every person so offending shall be

guilty of felony, and may be transported for life or for any term not less than seven years, or be imprisoned for not more than two years, with or without hard labour. By s. 2, so much of the 36 Geo. 3, c. 37, made perpetual by 57 Geo. c. 6, as is not repealed, is extended to Ireland. The information as to open and advised compassing, &c., by speaking, must be taken within six days after the speaking, and a warrant be issued within ten days after the information (s. 4). Indictments are valid, though the facts proved may amount to treason (s. 7), and principals in the second degree, and accessaries before the fact, are to be punished in the same manner as principals in the first degree. Accessaries after the fact are to be imprisoned for two years (s. 8). No costs (s. 10) are to be allowed in prosecutions under this act.

Dispensing with evidence of the proclamations on fines. CHAP. 70.—This unpretending act will be one of some practical utility, for by it fines levied in the Common Pleas “shall be conclusively deemed to have been levied with proclamations, and shall have the force and effect of fines with proclamations.” But this provision is not to extend to fines concerning lands, &c., which at the passing of the act shall be possessed, &c., by any person under a title adverse to or inconsistent with the operation of such fine if levied with proclamations.

Payment of debts out of real estate where executory devise. CHAP. 87.—This short but practically useful act, after setting out the 12th sect. of 11 Geo. 4, and 1 Will. 4, c. 47 (the act for payment of debts out of real estate), and reciting that the said 12th section “does not extend to the case of lands, tenements, or hereditaments of a deceased debtor, which are by descent, or otherwise than by devise, vested in the heir or co-heirs of such debtor, subject to an executory devise over in favour of a person or persons not existing or not ascertained, and it is expedient that the said provision of the said act should be extended to such case,” proceeds to enact, “that the said thereinbefore recited provision of the said act shall extend, and is hereby extended to any case in which any lands, tenements, or hereditaments of any deceased person shall, by descent or otherwise than by devise, be vested in the heir or co-heirs of such persons, subject to an executory devise over in favour of a person or persons not existing or not ascertained; and in any such case it shall be lawful for the court mentioned in the said recited provision to direct such heir or co-heirs, notwithstanding such heir or co-heirs, or any of them, may be an infant or infants, to convey, release, assign, surrender, or otherwise assure the fee simple, or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment, or other assurance shall be as

effectual as if the heir or co-heirs, who shall make and execute the same, was or were seised or possessed of the fee simple, or other whole estate so to be sold, and, if an infant or infants, was or were of full age."

Payment of rates and taxes by parliamentary electors. CHAP. 90.—By this act no person shall be required in order to entitle him to have his name inserted in any list of voters for any city, town, or borough in England, to have paid any poor's rates or assessed taxes, except such as shall have become payable from him previously to the 5th of January in the same year; and that no person shall be entitled to be on any such list of voters, unless the poor's rates and assessed taxes payable from him previously to the 5th day of January shall be paid on or before the 20th day of July next following.

Payment of parish debts, audit of parochial and union accounts, and allowance of certain charges therein. CHAP. 91.—This statute relates to the debts of a parish, to the audit of accounts relating to parishes and unions, and to the allowance of certain charges therein. It gives to persons contracting with overseers a remedy against their successors in office upon all such contracts as shall be made within the last three months of the overseers' year of office. An exception to a certain extent is made as to the bill of costs of the parish solicitor. The statute also allows of unions or parishes paying sums which may have been expended for their benefit, although, according to the strict rules upon the subject, such payment could not have been allowed in any audit of the accounts of such parish or union. It regulates the manner in which auditors shall certify disallowances or balances in the accounts they audit, and also any surcharges they may make in the course of their audit. This statute also enables the overseers of several parishes to join in the expenses of appeals against poor rates in certain cases. By CHAP. 114, the above act is amended by preventing district auditors from taking proceedings in certain cases.

Regulation of petty bag offices, of the practice of the common law side, and of the Inrolment-office, of the Court of Chancery. CHAP. 94.—By sect. 1, the offices of the senior, second, and third clerks are abolished. By sects. 2 and 3, a clerk of the petty bag (who is not to be an attorney of the court) is to be appointed, who is to execute his duties in person, except in cases of sickness, &c., when he may appoint a deputy, with the consent of the Master of the Rolls. By sect. 5, the clerk is not to act as attorney or solicitor. Sect. 7 fixes his salary; and by sect. 8, he may appoint such clerks to assist him as the Master of the Rolls may direct. By sects. 11 and 12, a seal of office is to be provided, and copies of documents sealed therewith are to be admissible in evidence. By sect. 14, specifications and disclaimers under 5 & 6 Will. 4, c. 83, are to be enrolled in the In-

rolment-office only. Sects. 16 and 17 provides for stamped inrolments being given in evidence. By sect. 21, solicitors may practice as attorneys on the common law side of the Court of Chancery. By sects. 22 and 23, writs may be tested and returnable in term or vacation. Sects. 25—32 provide for writs of *scire facias*, which are to be directed to the sheriff of any county, and declarations and pleas in *scire facias* are to be delivered and not filed. Issues in *scire facias* and upon traverses are to be tried in any of the superior courts. By sect. 33, writs and proceedings are to be prepared by the parties, or their attorneys; and by sect. 34, the common law judges may dispose of matters arising from, or incident to, any action on the common law side of the Court of Chancery.

Alteration of provisions relating to the charges for the relief of the poor in unions. CHAP. 110.—This statute relates to the mode of charging the relief given in certain cases in unions; the costs of the relief of wanderers, wayfarers, and foundlings in unions, shall (sect. 1) be charged to the common fund of the union; and, upon the application of such wanderers or wayfarers for relief, they may (sect. 10) be searched, and any money found upon them shall be applied to the common fund of the union. So (sect. 3) the costs of relieving paupers rendered irremovable by statute 9 & 10 Vict. c. 66, shall be payable out of the common fund. On the other hand, the costs of relieving casual poor, that is to say, persons becoming chargeable to a strange parish by reason of some accident, casualty, or sudden illness there, shall (sect. 2) be paid by the parish; or (if irrecoverable under 9 & 10 Vict. c. 66) by the union in which he resides, or by the parish or union to which he may happen at the time to be actually chargeable, and not by the parish in which he has met with the accident, &c., as formerly. As to the poor persons who are irremovable, and therefore chargeable to the union fund, as above mentioned, this statute (sect. 8) gives the guardians the same power that overseers have, of proceeding against the relations of such poor persons to compel them to contribute to their maintenance, and also (sect. 5) enables the guardians to assist them in emigrating, and charge the cost upon the common fund of the union, or parish in case of not being in union. The statute contains one other regulation, which promises to be most salutary, and was much wanted, namely, punishing persons (sect. 10) as vagrants who apply for relief, having at the same time money or other property in their possession, or under their immediate control, with which they may provide for their own maintenance, without the aid of the parish, and which they do not disclose to the overseer or other officer to whom they make their application. Also the regulation above mentioned as to the search of wanderers and wayfarers applying for relief, although perhaps an over strong measure is likely to be very beneficial.

Commons' inclosure. CHAP. 99.—This act extends the provisions of the act for the inclosure and improvement of commons.

Ecclesiastical districts. CHAP. 37.—This is an act to amend the law relative to the assignment of ecclesiastical districts.

Highway rates—Turnpike roads. CHAP. 66.—This act continues to 1st Oct., 1849, and to the end of the then next session of Parliament, an act for authorising the application of highway rates to turnpike roads.

Income tax. CHAP. 8.—This act continues for three years the duties on profits arising from property, professions, trades, and offices.

Indemnity Act. CHAP. 19.—This act indemnifies such persons in the United Kingdom as have omitted to qualify themselves for offices and employments, and extends the time limited for those purposes until the 25th of March, 1849.

Loan societies. CHAP. 64.—This act continues until the 1st of Oct., 1849, or to the end of the then next session of Parliament, the act to amend the laws relating to loan societies.

Stock in trade—Poor rate. CHAP. 85.—By this act the exemption of inhabitants from liability to be rated as such in respect of stock in trade, or other property, to the relief of the poor is continued to the 1st of October, 1849.

Yarmouth Disfranchisement Act. CHAP. 24.—This is an act for disfranchising the *freemen* of the borough of Great Yarmouth.

NEW COUNTY COURTS.

County court clerk—Appointment.—B. held the office of clerk of a court of requests under a local act; but, owing to illness, his son, who was in partnership with him as an attorney, had been appointed his deputy, and was acting as such at the time of the passing of the 9 & 10 Vict. c. 95. It was held that the son was not entitled by virtue of sect. 34, to be the first clerk of the county court, as performing the duties of clerk at the time when the local act was superseded (*Reg. v. Edye*, 13 Jur. 8). *Per Coleridge, J.*; "It must be taken that the relator is the son, and that his qualification is the only one to be now considered; and then it is clear that he was not holding the office *de facto* at the time of the passing of the 9 & 10 Vict. c. 95, within the meaning of s. 34, though he was in a certain sense performing the duties of it. The father was *de jure* holding the office, and he is not disqualified under this statute, though he may be performing the duties of the office by deputy. The 26th section of the statute provides for the person holding the office of clerk, having a

deputy in case of illness or unavoidable absence; and therefore illness is not a disqualification of the father."

Replevin—Bond to sheriff.—It has been decided that the sheriff, notwithstanding the 9 & 10 Vict. c. 95, must take a replevin bond, under the 11 Geo. 2, c. 19, to prosecute without delay (*Edmonds v. Challin*, 37 L. Obs. 419).

Clerks' salaries.—Sir George Grey has announced that which was apparent from the long delay in the settlement of the clerks' salaries, namely, that great difficulties stand in the way of an equitable adjustment, owing to the variety in the amount of labour, duties, and responsibilities imposed upon the several clerks and assistant clerks. But, let us add, the main part of this difficulty has resulted from what we must term the *stinginess* of the treasury in the allotment of salaries (12 Law Times, 540).

Possession of tenements—Beyond limits of district.—A judge of the county court has no jurisdiction to direct possession to be given of premises beyond the local limits of the court, under the 9 & 10 Vict. c. 95, s. 122 (*Ellis v. Peachey*, 37 L. Obs. 378).

Affidavit to deprive of costs.—The affidavit to deprive plaintiff of costs must show that defendant *dwelt* within the jurisdiction of the county court, and that neither party was an officer of the court where the action was brought (*White v. Wigley*, 37 L. Obs. 359).

MISCELLANEA.

Appellate jurisdiction of Lords.—We pass over the well-known historical fact, that the House of Lords had no inherent jurisdiction either to hear causes or appeals, and that the right to the latter, after violent contests with the House of Commons, was at length established in 1675, in Dr. Shirley's case. The bounds of that jurisdiction are now pretty accurately defined; the House possesses no appellate jurisdiction over ecclesiastical, maritime, colonial, bankruptcy, or lunacy cases; but there is an appellate jurisdiction for the United Kingdom, for all cases at law or in equity, as to the latter, even on interlocutory orders, except those cases at law where a statute prescribes a particular mode of adjudication, and does not reserve the right of appeal. It was, indeed, doubted by Lord Eldon—and on what subject did he not doubt?—and by Lord Redesdale, that there was jurisdiction over cases disposed of summarily by the courts below. An Irish case (*O'Neill v. Fitzgerald*, 3 Bli. N. S. 24), so late as the year 1829, gave rise to the doubt. A clerk of the Court of Exchequer having forged cheques, transfers were fraudu-

lently made of sums standing to the credit of one cause to the credit of another. The despoiled creditors moved that the Accountant-General should replace the stock; the contest by motion was between him and the Bank of Ireland. The court decided against the Accountant-General, from which decision there was an appeal. The point of jurisdiction was started by Lord Redesdale, and was subsequently argued with distinguished ability by Mr. Hart, and also by Mr. Shadwell. To our minds, their arguments were convincing; there was, however, no direct adjudication; the case was sent back to the Court of Exchequer, who declined to make any other order, and on its coming back to the House, that order was reversed without argument (*Irish Jur.* 116, quoting *Sugd. Real Prop. in Lords*).

Fixtures—Improvements.—Under the present law, no tenant ever does or ever will make the necessary buildings on his farm at his own expense, for it is contrary to human nature to sow that another may reap. But not only will the tenant not build; he is even unwilling to repair. The law generates a general feeling of hostility in the tenant's mind; a disposition to let every thing be neglected, to let go to "rack and ruin," rather than aid the legal robber, by exerting oneself under a law which says, that while one man makes the outlay, another may reap the benefit. The decision of *Elwes v. Mawe* (3 East, 51) affirming the principle that what a tenant has once annexed to the farm is not legally separable from it, because it has become the property of the landlord, subject only to such temporary interest as the tenant may have in the land, involves, of course, the still more important point, that no landlord or incoming tenant can be compelled to pay anything for agricultural improvements not capable of separation from the farm, such as draining, subsoiling, boning, guanoing, marling, claying, &c. These improvements have all sunk into the soil, and the soil is the landlord's. They are, therefore, forfeited to the landlord. The principle being of an all pervading nature, it becomes most material to inquire, whether its tendency is to promote or impede the public prosperity? Now, we do not hesitate to express our opinion that this principle is not only not right, but that it occasions the greatest mischief to all parties concerned—to the tenant, the landlord, and the public (9 *Law Rev.* 134, 135).

States of facts in equity—Proceedings thereon.—It has become a common practice to leave a state of facts in the Master's office without evidence, and then to attend for the purpose of obtaining (as it is expressed) the Master's view or opinion of the evidence he will require. The Master might (perhaps ought to) refuse to proceed, and tell the parties, "It is your duty to make your case perfect; my duty is to decide upon your case when so perfected; it is not my duty to advise you upon evidence." The parties say they are quite

aware of that; but the Master's general view would be a great recommendation to them; probably save time and expense. The Master gives way under protest that if, when the case comes before him, he should require further evidence, it must not be said they had followed his opinions: thus the Master becomes a party to instructing the case (Farrar's Master in Chancery, 15).

Custody of infants—Jurisdiction of Chancery where no property.—The jurisdiction of the Court of Chancery over the person of infants has been derived by all the great writers on this subject directly from the Crown, by an implied delegation of its authority, as *parens patriæ*, to assume the care of those who are unable to care for themselves. Lord Cottenham (re Spence, 2 Phill. 247) asserted the jurisdiction to be as stated above in the plainest language, and also added (which is material): "*The cases in which this court interferes on behalf of infants are not confined to those in which there is property.*" However, in the late case of re Fynn (11 Jur. 713), V. C. Knight Bruce, on a petition to take the custody of the children from the father and give it to the mother or other proper person, said: "I believe that I ought to require either an actual appropriation of property or income, or some security." This case raised the question of the jurisdiction in this manner: Neither the father nor mother seem to have been able to make any settlement upon the children. The father was shown to be unfit to have the care of them, and the question was not between him and a stranger seeking to be appointed guardian; but whether under these circumstances the court would deprive the mother of her children, and give them into the custody of such a father. Now, if the jurisdiction of the court to interfere be independent of any pecuniary consideration, this seems to have been an occasion for exercising it; but if the decision in this case is to be regarded as a precedent, it will in future be idle to deny that questions of property are in these cases after all of paramount importance (13 Jur.).

Criminal appeals.—The new court of criminal appeal, constituted under Lord Campbell's act (*ante*, pp. 13, 14), has now sat for two terms. The judges now are only five instead of being from twelve to fifteen (their usual number under the former system when hearing cases reserved for the assizes); but they deliver their judgments openly, and the court, though not so imposing in appearance, bids fair to be more effective than the court it has supplanted. What is now chiefly wanted to complete the improvement derived from the act is a more extensive right of appeal—an appeal on the fact whether a man is guilty or innocent, and not merely on a point of law (10 Law Mag. N. S. 170).

Report of commissioners on marriage with deceased wife's sister.—The commissioners seem to have thoroughly entered into the spirit of the thing; they found some confusion, they have left things worse

confounded ; they found the law in some points unsettled, and they have unsettled it as much more as they well can. Perhaps the most pressing and important question for their consideration was what effect the existing law has, or an altered law would have, on these connexions ? And they cannot get beyond "*a doubt whether any measure of a prohibitory character would be effectual. These marriages (they say) will take place when a concurrence of circumstances give [gives] rise to mutual attachment ;*" and in their "conclusion, in which nothing is concluded," they report "*whether any and what measure should be introduced for a change of the law, either on the side of relaxation or stricter prohibition, we must leave to the wisdom of the Legislature.*" The Blue book savours much too strongly of Messrs. Crowder and Maynard's [the solicitors] office for our taste, and we cannot help thinking that those gentlemen would have done the business quite as well as the commissioners. The main body of the evidence, arguments, statistics, and suggestions are all theirs, their agents are re-examined, their petitions and circulars re-printed, their ideas adopted, and, in short, the Blue Book is not only incomplete in other points, but it wants the usual subscription at the bottom of the cover—"Crowder and Maynard, plaintiff's solicitors" (10 Law Mag. N. S. 89).

New Bankruptcy Bill.—The Bankruptcy Consolidation and Amendment Act has passed through the committee of the Lords, and the third reading is postponed till after Easter.

Turnpike Trusts Bill.—It seems that in spite of Mr. Lewis's lucid explanation how it is that the Turnpike Trusts Bill will not in any way increase the burthen of the county-rate, inasmuch as the present produce of the tolls and highways will suffice to keep the roads in repair, to pay the interest upon the debt, and to form a fund for the repayment of the principal, there still prevails in many quarters considerable hostility to the measure (12 Law Times, 539).

Queen's counsel.—The Lord Chancellor's rejection of the applications recently made to him by certain members of the common law bar has produced much general observation, and created much disappointment and individual dissatisfaction. Indeed, we have heard of an instance in which one of the applicants—a barrister of some considerable standing and deservedly respected—has evinced his sense of annoyance at the manner in which his claims have been overlooked, by intimating his intention of retiring altogether from the profession (27 Leg. Obs. 406).

Medical and legal coroners.—In Manchester, on a contest for coroner, there being a medical and legal candidate, and the Town Council having the appointment, the legal candidate (Mr. Herford) was elected by a majority of 30. The Manchester Law Association memorialised the Town Council (1b. 413).

Voluntary settlement void against creditors.—After citing *Skarff v. Soulby* (*ante*, pp. 77, 78), and other cases, a writer in the *Jurist* observes: "We conceive on the whole that the true principle to be collected from the cases is this—that, in order to set aside a voluntary settlement under 13 Eliz., it must be shown that the settlor was, at the time, in such circumstances, that inability to pay his debts was actually existent, or reasonably to be apprehended by him, so that a presumption arises that the settlement was made with intent to hinder creditors; that indebted or not indebted, and the extent to which the settlor was indebted, are merely evidences from which the court will conclude that such a presumption arises; and that a trifling debt, due at the time of the settlement, and remaining unpaid, if it were shown that at the time of the settlement the settlor was abundantly solvent, would not be sufficient to set aside the deed" (13 *Jur. pt. 2*, p. 70).

NOTES OF RECENT LEADING CASES.

COMMON LAW.

BILL OF EXCHANGE.—*Alteration of bill conformably with intention*—*Stamp*—*Foreign bill*—[*Hamelin v. Bruck, infra*].—Declaration in assumpsit alleged that plaintiff, in France, drew a bill for a sum named, on defendant, which defendant accepted. Issues were joined, first, on a plea of non-acceptance; secondly, on a traverse of a plea alleging that plaintiff, after the acceptance, and without defendant's consent, changed the purport of the bill by altering the sum for which it was drawn. On the trial it appeared that the bill had been originally drawn in Paris for a larger sum than that named, but that defendant had accepted for a smaller sum. In the body of the bill the sum originally named had been altered to that for which defendant had accepted, but it did not appear by whom, or at what time or place, the alteration had been made. No stamp was on the bill. Held, that plaintiff was entitled to a verdict on both issues, the acceptance by defendant furnishing evidence that he assented to the insertion of the smaller sum, and it not being shown that the alteration—even if made by the parties contrary to their original intention—was made in England, so as to render a stamp requisite (*Hamelin v. Bruck*, 9 Q. B. Rep. 307; S. C. 10 *Jur.* 1094; 15 *Law Journ.*, N. S., Q. B. 243). *Per Patteson, J.*: "This case is not like *Knight v. Clements* (8 *Ad. and El.* 215), because there the bill appeared, on inspection, to have been altered, and there was nothing to explain the alteration. Here

the bill was drawn for £124 Os. 2d. and accepted for £122 Os. 2d., that explains and accounts for the alteration subsequently made in the body of the bill. There are, then, two reasons why the alteration does not vitiate the bill. First. It may be fairly taken to have been made in pursuance of the original intention of the parties. The plaintiff drew the bill for £124 Os. 2d., but he meant to draw it for the sum due to him from the defendant; and the defendant having accepted it for the latter sum, he acquiesced in it. Secondly. The bill having been drawn in Paris and accepted in London, why are we to presume that the alteration was not made in Paris? And in that case it would not require a stamp."

FACTOR.—*Authority of factor to sell for re-payment of advances made on consignment.*—[*Smart v. Sanders*, 17 Law Journ., N. S., C. P. 285].—This was an action by the principal against a factor for selling, contrary to orders, goods consigned to him; and the true question raised upon demurrer to several special pleas was, whether a factor who has made advances on account of his principal, has the right to sell the goods in his hands, contrary to the orders of the principal, on the principal making default in repaying the advances. For the plaintiff it was contended the factor possessed a mere right of lien, which was not to be understood as carrying with it any general right of sale to secure an indemnity; a lien, according to Story on Agency, p. 371, being ordinarily nothing more than a right of retainer of the property; and further, that the nature and object of the contract upon which goods are consigned by a principal to his factor, was such as by no means impliedly gave rise to an absolute authority to dispose of them in the event of the latter not being reimbursed his advances. On behalf of defendant it was argued it was part of the law of England, distinct from any particular usage, that a factor under advances to his principal, should, in such case, have a right to reimburse himself out of the proceeds of the consignment, provided the sale was made in the exercise of a sound discretion, and for the benefit of his principal, as was alleged in the pleas; and the dicta of Parke, B., in *Warner v. M'Kay*, 1 M. and W. 670, and of Mr. Justice Bailey in *Graham v. Leyster*, 6 M. and S. 5, as also some American authorities, were relied upon as justifying in some degree such an inference. The judgment of the court was delivered by Wilde, C. J., wherein it is observed, the total abstinence of any English authority in support of the factor possessing anything beyond a lien, was itself a strong argument against the existence of the right of sale contended for. The case of *Graham v. Leyster*, it is said, was obviously distinguishable from the present case, because there an express authority to sell at the factor's discretion had never been revoked. But in regard to the point whether if goods being consigned to a factor for sale, and advances being afterwards made

upon them, he thereby acquired an authority, coupled with an interest, so as to render such authority to sell irrevocable (and it was in such point of view the lien was most strenuously contended for), the court said, the doctrine of an irrevocable authority applied only to cases where the authority was given for the purpose of being a security, or part of the security, and not to cases where the authority was given independently, and the interest of the donee arose afterwards, and was incidental only. Such was the view taken in *Walsh v. Whitworth* (2 Esp. 565), and since acted upon. So here, the goods being consigned to the factor for sale, that conferred an implied authority to sell; yet the factor's afterwards making advances did not make it an authority coupled with an interest; but there was an independent authority and an interest subsequently arising, which authority might therefore at any time be revoked. It was not denied the making such an advance might be a good consideration for an agreement that the authority to sell should be no longer revocable, but it was asserted there was no authority or principle of law for saying such an effect would arise independently of the agreement (*Smart v. Sanders, supra*).

NUISANCE.—*Landlord and tenant—Smoke from chimney—Owner of premises*—[*Rich v. Basterfield, infra*].—Although the owner of property may, as occupier, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants, such liability attaches only upon parties in actual possession. When, therefore, an action was brought against A. the owner of premises, for a nuisance arising from smoke issuing out of the chimney, to the prejudice of the plaintiff in his occupation of an adjoining messuage, on the ground that A. having erected the chimney, and let the premises with the chimney so erected, had impliedly authorised the lighting of a fire therein: Held, that the action would not lie. Held also, that inasmuch as the premises were in the occupation of B., a tenant, at the time the fires were lighted, A. was entitled to a verdict, on a plea of "not possessed," the allegation as to possession having reference to the time when the nuisance complained of was committed, and not to the time at which the chimney was erected (*Rich v. Basterfield*, 4 Com. Bench Rep. 783; S. C. 2 Car and Kirw. 257; 11 Jur. 696; 16 Law Journ., N.S., C. P. 273). *Per* Cresswell J. (after stating the case of *Rex v. Moore*, 3 B. and Adol. 184): "Another case relied on was *Rex v. Pedly* (1 Adol. and Ellis, 822), in which it was said, if a landlord erects a building that is a nuisance, and lets the land with the building so erected on it, he is liable to be indicted for such nuisance being continued or created during the term. The case of *Rosewell v. Prior* (2 Salk. 460) was cited to show that if a tenant for a term of years erected a

building which was a nuisance to his neighbours, he was liable to be sued for a continuance of the nuisance; which, it was contended, was an authority for saying, that the defendant having built the chimney, and having let the shop with the chimney in it, he was liable for the injury done. * * It was not contended at the trial, or on the argument, that the chimney erected by the defendant was itself a nuisance, unless used in a manner that caused the smoke to issue to the prejudice of the plaintiff, in the occupation of his own premises. No complaint could be made against the landlord. He did not let the premises with any existing nuisance on them; and if he had, by letting the chimney to the tenant with the occupation, such tenant would be liable for a continuing and upholding of the nuisance, as in *Rosewell v. Prior*. Nor did the defendant enter into a contract, express or implied, with the tenant to make a fire in the stove. The latter might have done it without subjecting himself to the complaint of the plaintiff, or might have made fires in a more convenient mode, as by using coke, or have abstained from making fires at all when the wind was in such a direction as to carry the smoke to the plaintiff's house; and it is quite possible for the defendant to have occupied the shop without making fires, it being optional on his part to make them at all, or to make them in such manner, and at such times, as not to annoy the plaintiff, or create any kind of smoke to create a nuisance. The case resting not on the erection of the chimney, but the subsequent use of it by the defendant, the question is whether he is guilty of a nuisance. Several cases are cited, in which the owners of fixed property have been held liable for the consequences of acts done on it by persons not strictly their servants or agents; but the principle on which those cases proceeded is clearly laid down by Mr. Justice Littledale, in *Laughter v. Pointer* (5 B. and C. 547), which judgment has been much acted on by the Court of Exchequer in *Quarman v. Burnett*, (6 Mees. and W. 499). The principle stated by Mr. Justice Littledale is that, where a plaintiff is in possession of fixed property, he must take care that it is so used and managed that other persons are not injured, whether it be managed by his own immediate servants, or whether conducted by other person's servants. This rule is expressed in all the cases, except *Leslie v. Pounds* (4 Taunt. 649), and *Rex v. Pedly* (1 Adol. and Ell. 822). * * If *Rex v. Pedly* is to be considered as a case in which a landlord is to be held liable because he had demised the buildings on which the nuisance existed, or because he had relet them after the necessary buildings had created the nuisance, and because he had undertaken the cleansing and had not performed it, we think the judgment right, and it does not militate against the present position: but if it is to be taken as a decision that a landlord is responsible for the acts of

his tenants in creating a nuisance, we think it goes beyond any principle laid down in any previously decided cases, and we cannot assent to it. For the reasons given, we think the verdict in this case should be entered for the defendant, on the plea of not guilty, as well as on the issue of not possessed, which refers to the time when the nuisance was created."

EQUITY.

STATUTE OF LIMITATIONS—*Effect of statute saved by creditors' bill—Judgment creditor not party to bill.*—It is well settled that an ordinary creditor's suit, instituted on behalf of the plaintiff and all others who shall come in and prove, has the effect not only of keeping alive the plaintiff's own demand, but those of all the other creditors who come in under the decree. The principle of this rule is, that where a bill is filed by one creditor on behalf of himself and other creditors, and the others come in under the decree, it is reasonable to presume that they were lying by, seeing that there was a suit in progress, in the course of which they would be enabled to come in and prove their demands, and it would be impolitic to lay down a rule which would make it necessary for each creditor to institute a separate suit, or commence a separate action for the recovery of his particular demand. The leading case on this subject is *Sterndale v. Hankinson* (1 Sim. 393). The marginal note of that case is, "A bill filed by one creditor, on behalf of himself and all others, will prevent the statute of limitations from running against any of the creditors who come under the decree." The bill in that suit was filed on the 5th of May, 1812, on behalf of the plaintiffs and all other creditors of G. H. deceased, he having died the 27th June, 1810. On the 14th April, 1818, the usual decree was made. The Master reported against several claims, on the ground that the testator having died in 1810, and the decree not being made until eight years afterwards, the claimants were barred of any remedy. To this report three of the creditors excepted. In the course of the argument the Vice-Chancellor observed, "This is not a bill filed simply by A., but by A. on behalf of himself and all other creditors. It is, in fact, a bill by all the creditors." In his judgment, he says, "The other fallacy is, that the statute bars the suit in equity, which it does not [this was prior to 3 & 4 Will. 4, c. 27]; but as courts of equity will not entertain stale demands, they have thought proper to adopt the limit of six years in analogy to the statute, and pleas of the statute are admitted in these courts on analogy only, but when the circumstances of a case are such as to make it against conscience to apply the rule founded on this analogy, the court will not enforce it. It has been said, that if a creditor files a bill on behalf of himself and others, and permits it to be dismissed before decree, the statute would

apply. I dissent from this proposition ; for I think the court would protect a creditor against an accident of that kind." "Suits have been instituted in which creditors, in consequence of the deaths of parties, and a variety of other circumstances, have been unable to procure a decree for two or three years, although every reasonable diligence may have been used ; and if the schedules to most of the reports made in suits of this nature were looked through, it would be found by comparison of dates, that two-thirds of the creditors might have been shut out by a strict application of the rule. I entertain no doubt that every creditor has, after the filing of the bill, an inchoate interest in the suit, to the extent of its being considered as a demand, and to prevent his being shut out because the plaintiff has not obtained a decree within the six years ; and, therefore I am clearly of opinion that this exception must be allowed." It has even been decided that the statute is saved by a judgment creditor's bill, not filed by the plaintiff on behalf of himself and all others, but the prayer of the bill being that of a bill on behalf of all the creditors (*O'Kelly v. Bodkin*, 2 Irish Eq. Rep. 361). In the very recent case of *Bennett v. Bernard* (1 Irish Jur. 145) the doctrine of these and other similar cases was much considered, and it was there held that a judgment creditor cannot avail himself of the pendency of a foreclosure suit, as preserving his debt from being barred by the statute of limitations. The Lord Chancellor said : "This bill is the bill of a mortgagee (filed in 1811) ; it prays an account of what is due to him ; it, no doubt, prays an account of incumbrances, and the conusee (the judgment creditor) might come in to prove his debt, but he has no priority with the plaintiff. It was not till 1841 that a bill was filed which the judgment creditor might himself have filed. Now, the language of the cases demonstrate this principle, that though the words of the act of the 3 & 4 Will. 4, c. 27, s. 40, do not refer to the proof of demands under a bill, it must be at least in the nature of a bill for the recovery of the demand in question. The mortgagee's suit was not for the recovery of the judgment creditor's demand ; he could not have instituted that suit, nor could any one else have filed the bill on his behalf. No doubt the bill of 1841 was one of which he might have the benefit if he were in proper time ; that was for general administration, but then the judgment had been long barred. In the case of *Watson v. Birch* (15 Sim. 528 ; S. C. 16 Law Journ., N. S., Ch. 788 ; 11 Jur. 198), the V. C., after remarking that *Sterndale v. Hankinson* was decided before the statute, says—'As I have expressed it to be my opinion that the statute of the 3 & 4 Will. 4, c. 27, s. 40, prevents any proceeding being taken to enforce a judgment against either land or personal estate after the expiration of the time limited by it, it seems to me that the matter was con-

cluded, unless there was something in the bill filed in 1817, or in the proceedings upon it, which prevented the statute from operating. I cannot, however, make out that there was anything that could have that effect.' He then goes into the consideration of the question in that case, into which it is not necessary for me to follow him. I may consider the cases in this country not to be disturbed here, but by allowing this claim I should be carrying them beyond their principle, and introducing a new exception into the statute."

CONVEYANCING.

COPYHOLDS.—*Fees on surrender and admittance—Railway company—Land's clauses consolidation act.*—[*Cooper v. the Norfolk Railway Company*, 13 Jur. 195.]—This case is a most important one for stewards of manors; but before stating it we may notice the provisions of the Land Clauses Consolidation Act of 1845 (the 8 Vict. c. 18) as to copyholds. By sect. 95, copyholds are to be conveyed by the same species of assurance as if they were freehold, but the deed is to be enrolled on the rolls of the manor; and until the lands are enfranchised they shall continue subject to the same fines, rents, heriots, and services, as were theretofore payable. Three months after the enrolment, or within one month after the promoters of the undertaking shall enter on the lands for the purpose of the works, they shall procure the same to be enfranchised, and for that purpose shall apply to the lord, and pay him such compensation as shall be agreed upon; and, if the parties fail to agree, the amount of such compensation shall be determined as in other cases of disputed compensation (sect. 96). Upon payment or tender of such compensation, or on deposit in the bank, according to the circumstances of the case, or if the lord fail to adduce a good title, the promoters of the undertaking may execute a deed-poll, and thereupon the land shall become freehold (sect. 97). If any copyhold land be subject to any customary rent, and part only of the land subject to the rent be required to be taken for the purposes of the act, the apportionment of such may be settled by agreement between the owner of the lands and the lord of the manor, on the one part, and the promoters of the undertaking, on the other part; and if such apportionment be not so settled by agreement, then the same shall be settled by two justices (sect. 98). Where copyhold land is taken by a railway company under the Land Clauses Consolidation Act, 8 Vict. c. 18, the steward of the manor is bound to enrol the conveyance required by that statute, on payment of such fees only as would be due to him on the surrender of the land to the use of a purchaser, and has not any claim for the fee due on admittance also (*Cooper v. the Norfolk Railway Company*, *supra*). *Per Parke, B.*: "According to the ordinary meaning of the words used, the steward was

bound to enrol this parliamentary conveyance on payment of such fees as would be due to him on the surrender of the lands to the use of a purchaser; he would not have any claim for the fee due on admittance also, for that is a different fee. If this construction can be shown to be at variance with the intention of the Legislature, to be collected from other parts of the act, or would lead to some manifest injustice, we might see if the language of the act could be construed so as to avoid those results. At first view it would seem that as the Legislature probably meant no one to be a loser by the powers given to these companies, it would be unjust to oblige the steward for one fee to perform an act equivalent to a surrender and admission, which if the statute had not passed would have entitled him to two. But, on consideration, it will be found that there is no injustice in this enactment. There are two reasons why the provision may be deemed a perfectly fair one. First, because the Legislature may have considered that if the act had never passed the steward would have had no fee at all; and besides that the passing of the act would cause an increase of his business, which would compensate for the smaller fee. And a second reason is that the effect of the parliamentary conveyance is to put the purchasers of the company substantially in no better condition than if they had been mere surrenderees, for the next clause in the statute compels them to enfranchise the copyhold; and as surrenderees they might, no doubt, have done that without admittance. (See *Wilson v. Allen*, 1 Jac. and W. 611.)

TRUSTEES.—*Extent of estate on devise to trustees without words of limitation*—[*Doe dem Müller, v. Claridge*, 13 Jur. 173].—This case turns upon these questions: 1. Generally what estate does a trustee take under a devise (prior to 1 Vict. c. 26), without words of limitation?—2. In particular, where the trusts are for the use of a married woman, and to her separate use? It appeared that the testator, by his will, directed his executors and trustees therein named "to pay and discharge all his just debts, funeral and testamentary expenses, and subject thereto;" he devised a freehold messuage to the said executors and trustees, in trust, to permit his wife to live thereon during her life; and, after her decease, he devised the same "unto the said executors and trustees, and the survivor of them, his executors and administrators, in trust, to permit and suffer" his daughter Ann to receive and take the rent of the said messuage during her life, free and independent of the debts, control, or engagements of her present or any future husband; and, after her decease, the testator devised the said messuage to his said "executors and trustees, their executors and administrators, upon trust," to pay and apply the rent to the use of Israel M., the eldest son of his said daughter Ann in the event of his not attaining

twenty-one at the time of the decease of the testator's said wife and daughter Ann. And after the said Israel should attain such age of twenty-one, then the testator devised the said messuage to the said Israel for his life. The testator, by his will, then proceeded to make to the said trustees certain contingent devises, which never happened, and devised the residue of his property "unto and between his said wife and his said daughter Ann, in equal shares and proportions, share and share alike; the share of his said daughter, also independent of the debts, control, or engagements of her present or any future husband, in manner aforesaid." Held, that the heir of the testator's daughter Ann took under the will a legal—and not merely an equitable—estate in the residue (*Doe d. Müller v. Claridge*, 13 Jur. 173). *Per* Cresswell, J.: "We are of opinion that the lessors of the plaintiff, as co-heirs of Ann Müller, have the legal estate in the residue, and that this rule must be discharged. It is clear that, under the first part of the will, whether the estate goes to the trustees, and remains in them in trust, or the use be executed in the devisee beneficially interested, the testator did not intend to give the fee. There are no words of inheritance; the direction to pay the debts, and so forth, will not supply their place; and the repetition of a devise to trustees, after each of several particular estates, occurs here, a circumstance much relied on by Lord Eldon in *Hawkins v. Luscombe* (2 Swanst. 375), as shewing that the whole legal estate was not at once given to the trustees. Then, with regard to the devise of the residue, in terms it is to the wife and daughter in equal shares, without mentioning the trustees and executors; but it was argued that, as the share of the daughter in the residue was to be 'independent of the debts, control, or engagement of her present or any future husband, in manner aforesaid,' the testator plainly intended that she should take the residue in the same manner as the particular estate before devised to her, namely, through the intervention of trustees, and that they, consequently, would take the legal title by implication. We think, however, that the words 'in manner aforesaid,' are satisfied by supposing that the testator intended to give her the residue as well as the particular estate to her separate use, and that they cannot have the effect of giving the estate by implication to the trustees; if they could, still the estate to them would only be co-extensive with the object to be attained, namely, the protection of her interest during her life. It would, therefore, determine on her death, and the co-heirs at law would still take the legal estate. This view of the case appears to be warranted by the case of *Jones v. Lord Saye and Sele* (1 Eq. Abr. 383, reported also in Vin. Abr. 'Devise' (C. b.), pl. 19; cited in *Harton v. Harton*, 7 T. R. 652)."

CHARGING BENEFICES.

We are now to consider the subject of charges, either direct or indirect, by an incumbent of his rectory or vicarage, for payment of debts or annuities. By the rules of the common law, according to the better opinions, the incumbent could lawfully charge or demise the glebe of his benefice in favour of a creditor (See *Wyse v. Beresford*, 3 Dru. and Warr. 289; *Mouys v. Leake*, 8 Term Rep. 411). In this last case Lord Kenyon said: "In this case a clergyman executed a deed by which he granted an annuity out of certain benefices. This is not *malum in se*; there is nothing wrong in such a transaction, except as far as it is prohibited by statute" (See also *Metcalf v. Archb. of York*, 6 Sim. 224; S. C. 1 Myl. and Cr. 547). It is, therefore, clear that, except by virtue of some statute, demises or charges by incumbents of their benefices are not legal (See *Doe d. Cates v. Somerville*, 6 Barn. and Cres. 126; *Doe dem. Broughton v. Gully*, 10 Barn. and Cres. 344; *White v. Bishop of Peterborough*, 3 Swanst. 109; *Collins v. Archer*, 1 Russ. and Myl. 284).

13 Eliz. c. 20 and 14 Eliz. c. 11.—There have been two statutes passed. The first is the 13 Eliz. c. 20, s. 1, by which it is provided, in the first place, that no lease to be made of any benefice or ecclesiastical promotion with cure, or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice, without absence above fourscore days in any one year, &c.; and, secondly (which is what we are chiefly concerned with), that all chargings of any such benefice with cure of souls, with any pension, or with any profit out of the same, to be yielded and taken, thereafter to be made, other than rents to be received upon leases, according to the meaning of that act, shall be *utterly void*. By s. 15 of 14 Eliz. c. 11, after reciting that sundry evil disposed persons had defeated the meaning of the preceding statute, it is enacted that all bonds, contracts, promises, and covenants, thereafter to be made for suffering or permitting any person to enjoy any benefice or ecclesiastical promotion with cure, or to take the profits or fruits thereof, shall be adjudged of such force and validity as leases by the same persons made of such benefices, &c., with cure—that is, to be void on the parson's non-residence. This statute in effect says, that if the bond or covenant was in effect a lease, it shall be good to the same extent as leases, by 13 Eliz. c. 20. The 13 Eliz. c. 20 was at first only temporary, but after various continuances, was by 3 Car. 1, c. 4,

made perpetual. We shall presently see that the 13 Eliz. c. 20, has been repealed, and then afterwards revived.

We may here state that it has been fully settled by decisions, on the 13 Eliz. c. 20, that though in form the instrument is a lease reserving rent, yet if in substance it is a charge it is void (see *Shaw v. Prichard*, 10 Barn. and Cres. 241).

The design of the preceding statutes is not to protect the successor, but the actual incumbent alone. They carry out the principle, that the income of the living ought not to be enjoyed separately from the ownership, or enjoyment of the living. The effect of the statute is not to vitiate the contract itself, but only so far as it is a charge on an ecclesiastical living with cure of souls. If the contract be to secure a sum of money or an annuity, in all probability there will be a covenant for payment of the principal and interest, or there will be a warrant of attorney securing the same. Though the transaction should be void as a charge on the covenantor's living, yet the personal covenant to pay is not affected. We remark in this the distinction between a statutable and a mere common law illegality, *i. e.* between a statutable illegality, expressly declaring the whole transaction illegal. Thus the statutes against usury avoid the whole transaction; so do the annuity acts for non-enrolment; and consequently in these cases, the covenant for payment is gone. But if the statute merely avoided the particular transaction, so far as concerned the illegality, it would be as in the case of a common law illegality, that is, it would not affect the instrument, except so far as it offended against the statute. So here, except so far as the instrument is a charge on the benefice, it is not affected (see *Mouys v. Leake*, 8 Term Rep. 411; *Gibbons v. Hooper*, 2 Barn. and Adol. 738; *Wynne v. Robinson*, 4 Bligh, N. S. 27).

Statutes repealing, &c. the 13 Eliz. c. 20.—We mentioned before, that the 13 Eliz. c. 20 had been repealed and revived, and we may now state the circumstances. By the 43 Eliz. c. 84, s. 10 (1803), the 13 Eliz. c. 20, with all explanations, additions, and alterations thereof, by the 14 of Eliz., &c., and so much of 3 Car. 1, as made the same perpetual were repealed. But the 43 Geo. 3, c. 84, was itself repealed by the 57 Geo. 3, c. 99, s. 1 (1817), but so much of the 13 & 14 Eliz., and 3 Car. 1, c. 4, as related to *leases* of benefices, &c., were expressly repealed; thus though the repeal of the 43 Geo. 3, revived the 13 Eliz. c. 20, it was subject to the repeal of the provisions relating to leases, &c.

It will thus be seen that between 1803 and 1817, the 13 Eliz. c. 20, was not in operation at all, and that since that period, only that portion relating to charges of benefices is law.

It has been held in several cases that a charge on a living, executed after the passing of the 43 Geo. 3, c. 84, and before the

passing of the 57 Geo. 3, c. 99, is valid (*Doe v. Gully*, 9 Barn. and Cres. 344; *Metcalf v. Archbishop of York*, 6 Sim. 229).

Annuity charged on benefice—Collateral bond.—It has been decided, that though an annuity may be void as being a charge on a benefice, yet the covenant of the grantor, as also that of any sureties for payment of the annuity is enforceable, though the covenant refer to the void grant (*Wynne v. Robinson*, 4 Bligh, N. S. 27). This was on the Irish statutes, but the principle is applicable to the English acts. There R. W., being possessed of a certain vicarage, and also a rectory, and chantryship in Ireland, in consideration of a sum of £6000 advanced to him by the Globe Insurance Company, granted to them, and charged upon his said benefices, an annuity of £825 5s. for a term of 99 years, if R. W. should so long live. By a bond and warrant of attorney of the same date, with reciting the indenture and reciting that the annuity should be still further secured by the bond and warrant of attorney, R. W. and O. W. became bound to certain trustees for the Globe Company, in a penal sum of £6000 conditioned for payment of the annuity. It was held by the House of Lords, that the collateral security by the bonds was valid, although the charge on the benefice was void under the statutes.

The rule is this, the obligation or bond is to be considered as a personal security for payment of the annuity or other charge. But in reference to this bond there is one caution; it is true it is but a personal covenant, yet if it be of that description to which the second statute of Eliz. refers, that is, if it in the most remote manner refer to satisfaction out of the profits of the benefice, it will be invalid.

Warrants of attorney.—The most ordinary cases as to charging benefices, arise from taking a warrant of attorney with a view to a judgment. The points here to be considered are, when does a warrant of attorney, given by a clergyman, constitute a charge on his benefice, and when is it a mere personal charge? There is an essential distinction between a judgment by virtue of a warrant of attorney and process in pursuance of it, and an express charge on the benefice. The warrant of attorney leads to a judgment, and a judgment is a charge on lands, but still the judgment does not necessarily lead to a charge. The execution is by a sequestration. As to what a sequestration is see *per* Taunton, J., in Barn. and Adol. 739, and *per* Sir E. Sugden, 3 Dru. and Warr. 286. The warrant of attorney leads to a judgment, and that is followed up by a sequestration, so that it is clearly shown that the judgment does not of itself necessarily create a charge on the benefice, though the consequence of the judgment may be a sequestration of the profits of the living, and though the consequence of such sequestration will be the setting aside a por-

tion of the profits to pay the amount secured. As Mr. Just. Coleridge said in *Bendry v. Price* (7 Dowl. 753; S. C. 4 Jur. 1151), "nothing is more clear than that ecclesiastical goods and chattels are liable to be taken in execution by a proceeding which is peculiar to that sort of property. * * We must take care not to protect ecclesiastical persons from a just execution for their debts. * * The question is, whether on the face of the document there appears to have been an execution for a debt, or is it in substance a charge on the benefice?" If it is a personal charge only, it is not void within the meaning of the stat. of Eliz. And a warrant of attorney *simpliciter* is a mere personal charge. But where upon the face of the warrant of attorney it appears to have been given with the intention of charging the benefice, it is a charge and therefore void. Let us suppose that the defeasance to the warrant of attorney which limits the right of the judgment creditor to issue execution, restricts him from entering up judgment until a certain period, or until a certain event; and suppose that there is a deed of even date granting an annuity, in such a case the defeasance will recite the grant of the annuity, and it will apparently appear to be illegal. However, it is a common case, to so incorporate the invalid contract into the warrant of attorney. The courts look at the defeasance as merely identifying the sum of money, and though in fact the warrant of attorney is given to secure the illegal grant of annuity, yet if it merely recite the grant, the courts treat it as mere identification, and hold the warrant good.

Suppose a warrant of attorney in the defeasance to recite the grant of an annuity by a clergyman, and to state that it is given by way of collateral security, and that if default be made in payment of the annuity, judgment shall be entered up, and a sequestration be had of the profits of the benefice. This mere reference to the natural consequences of a judgment is sufficient to invalidate the warrant of attorney, as it shows that the party taking it had in view a charge on the profits of the benefice. This is shown by the case of *Flight v. Salter* (1 Barn. and Adol. 673). There a warrant of attorney, after reciting the grant of an annuity by an incumbent, and that the same was secured by a demise of the rectory, glebe, and tithes, declared that such warrant was executed for the purpose of securing the annuity, and to the end and intent that a sequestration might be obtained by the annuitant, and kept in force during the continuance of the annuity, for better securing the same. It was contended in support of the sequestration, that if the court held this warrant of attorney void, it would follow that no clergyman could give any bond or judgment which might, by any possibility, affect his living. Lord Tenterden said, the warrant of attorney states that it was given to the intent that the sequestration might be issued; it was, therefore, given

for the express purpose of enabling the grantee of the annuity to get possession of the benefice, and that he could not do by any other means. The warrant of attorney though good for other purposes, is a fraud on the statute of 13 Eliz. c. 20; the warrant of attorney and sequestration founded on it (added his lordship), must, therefore, be set aside. This case was followed up in *Newland v. Watkin* (2 Moo. and So. 174; S. C. 9 Bing. 113). There the defendant, a beneficed clergyman, gave the plaintiff a warrant of attorney to secure a previously contracted debt, authorising the plaintiff to enter up judgment thereon, and "to sue out one or more writs of *fieri* or *levari facias de bonis ecclesiasticis*, or *sequestrari facias*, and to procure one or more sequestrations thereon" against the defendant's livings. The plaintiff having entered up judgment and sequestered the defendant's livings, the court (at the instance of an annuity creditor having a subsequent judgment, and without the concurrence of the defendant) granted a rule to restrain the plaintiff from further enforcing his writ of sequestration, on the ground that the warrant of attorney, being a "charging of a benefice with a pension or profit," was void by the 13 Eliz. c. 20. In reference to the second creditor, C. J. Tindal, said: "We are to consider whether his proceedings are legal. It appears that by the annuity deed, the annuity granted to him by the defendant is charged upon the defendant's living; and that for better securing the annuity, a warrant of attorney was executed. But although the charge upon the living be void by virtue of the 13 Eliz. c. 20, according to the authority of *Shaw v. Pritchard* (10 Barn. and Cres. 241); yet the grant of the annuity is not made void, nor is the warrant of attorney, which contains nothing in the defeasance to show that it was intended to bind the living, void, more than in any other case where a clergyman gives the same security" (*Gibbons v. Hooper*, 2 Barn. and Adol. 734).

These cases (and others are mentioned in them) establish this rule: that no mention should be made either in the warrant itself or in the defeasance of any process by sequestration. The warrant and the defeasance should be silent on this, and then a sequestration founded on a judgment on such an instrument will be perfectly valid.

We may now notice a very recent case upon this subject, *Long v. Storis*, 13 Jur. 227. There it appeared that the owner of an advowson mortgaged it, and also mortgaged the equity of redemption, and then sold the advowson, subject to the mortgages, and took from the purchaser a mortgage of the advowson for securing the purchase money. The purchaser, to induce the first mortgagee to allow his money to remain on the security, gave him a warrant of attorney, and a similar security to the second mortgagee, and also another to

the vendor for the amount of the purchase money; and it was arranged that the first mortgagee's judgment should have priority. The living was subsequently sequestrated, and a bill was filed by the first mortgagee for sale and foreclosure, and he moved for a receiver, and for an injunction to restrain the defendants, the other incumbancers, from compelling payment from the sequestrator of the money in his hands. The court held that the transaction pointed so particularly to making the judgments and sequestration a charge on the living, as to come within the prohibition of 13 Eliz. c. 20, and refused the motion. V. C. Knight Bruce said: "I am of opinion that the alleged agreement respecting the judgments and sequestrations, points so particularly to making them a charge upon the living, as to bring them within the operation of the cases cited (*Alchin v. Hopkins*, 1 Bing. N. C. 99; *Newland v. Watkin*, 9 Bing. 113). I am also of opinion that the court cannot, without tainting itself with simony, accede to the present application for a receiver and an injunction."

From what has already been stated, it may be laid down that provided no reference appear on the face of the warrant of attorney or defeasance to anything which will operate as a direct charge on the benefice, the occurrence of expressions creating a direct charge thereon in any collateral instrument, or even an express demise of the tithes, &c., will, even if such collateral instrument be referred to, be immaterial, as far as the judgment and execution on the warrant of attorney are concerned (see also *Colebrook v. Layton*, 4 Barn. and Adol. 576; S. C. 1 Nev. and Man. 374; *Johnson v. Brazier*, 1 Adol. and Ellis, 624; S. C. 3 Nev. and Man. 654; *Britten v. Wart*, 3 B. and Adol. 915; *Gibbons v. Hooper*, *supra*; *Faircloth v. Gurney*, 9 Bing. 622; *Saltmarshe v. Hewitt*, 1 Adol. and El. 812; *Kirlew v. Butte*, 2 B. and Adol. 736; *Wynne v. Robinson*, 4 Bligh, N. S. 28). The principle of these decisions is that, the reference being for the mere purpose of identification, the court cannot look at the instrument referred to with a view to incorporate its provisions in the warrant of attorney. The courts would not allow the contents of the deed to be brought before it by affidavits.

We may even go beyond the above proposition and state that, though the defeasance express that the warrant is given as a collateral security for the debt, and that the debt is further secured by a grant and demise of the benefice of even date, which latter is void as being a charge, yet the warrant will not be invalid. This appears from *Bendry v. Price* (7 Dowl. 753), and *Bishop v. Hatch* (*ibid.* 763). In the former case Coleridge, J., said: "In every case the question is whether on the face of the document there appears to have been an execution for a debt, or for a charge on the benefice? That is the principle by which the question is to be tested. There is, more-

over, this rule laid down, that the courts will not look beyond the documents themselves, and will not receive affidavits to explain the circumstances under which they were given. * * * It is said that the reference in the defeasance to the void deed of lease of the vicarages will make a warrant of attorney itself void. But they are two securities given for the same amount, and one is not void, because that amounts to a charge on the benefice, but because the security itself is a charge within the statute. It does not, therefore, follow that the object of the other will in itself make it void."

NOTICES OF NEW BOOKS.

Questions for Law Students on the Second Edition of Mr. Serjt. Stephen's New Commentaries on the Laws of England. By JAMES STEPHEN, Esq. London: H. Butterworth.

The design of the book whose title we have above set out, is to furnish the readers of Mr. Serjt. Stephen's Commentaries with a series of questions on the chief subjects treated of in the four volumes of the "New Commentaries." Many persons well able to give an opinion on the subject have expressed themselves favourable to such a plan, as likely to impress upon the mind of the student the most prominent points of a work, and we know that very many law students have expressed a wish for the appearance of such a work as the above. We fear, however, that some of our readers will be sadly disappointed when they find that the references are to the *second edition only* of the commentaries. This certainly is a matter of inconvenience to the possessors of the first edition, more particularly, as a great alteration has been made in the arrangement of vols. 1 and 2 of the Commentaries, at least so far as relates to the paging. Thus, in the second edition, we have the subjects of copyholds and incorporeal hereditaments treated of in the first volume, instead of being in the second volume as in the first edition, and copyholds are treated of prior to instead of after incorporeal hereditaments. These alterations affect the paging of the subsequent volumes. We think that a very little more trouble would have enabled the compiler of the "Questions" to have referred to the first edition as well as to the second. However, any one having the first edition may alter the paging for himself, or may do without that, going by the books, chapters, and sections which are preserved in the table of contents and in the body of the questions.

Some of our readers will, we doubt not, think the price rather

high, but as there are nearly 360 pages, we do not see how it could have been published much cheaper.

As to the mode in which the "Questions" are framed, we can assure our readers, after a careful examination of many chapters, that we feel satisfied that Mr. Stephen deserves great credit for the evident care and labour which he has bestowed thereon. The questions are put in such a way as to require for their correct answering a full knowledge of the text of the "New Commentaries." At the same time they are framed concisely and distinctly. It is, of course, impossible to give a satisfactory statement by description of the mode in which the questions are framed, and we therefore think it best to present an extract from those on the "*Contract of Sale*." To two or three of the questions we have appended in brackets references to very recent cases as likely to be useful to our readers. The figures "60," &c., refer to the pages in vol. 2 of Mr. Serjt. Stephen's second edition of the *New Commentaries*.

"How does a contract of sale differ from an exchange?—p. 59.

"State the law as to the time in which the property in the things sold becomes transmuted; and does the same rule apply both to a ready money and a credit sale?—p. 60.

"What is the meaning of earnest?—p. 60.

"When something remains to be done by the vendor to the goods sold, when does the property in them pass to the vendee?—p. 61.

"Is the time of the vesting of the goods, and that of the time of the vesting of the right of possession the same?—*Ibid*.

"What was enacted by the 17th section of the statute of frauds, 29 Car. 2, c. 3, as to goods where the price amounts to £10.—*Ibid*.

"To what contracts is this provision extended by 9 Geo. 4, c. 14, s. 7, and how is that statute usually cited?—p. 62.

"What is stoppage *in transitu*, and when is the vendor entitled to this privilege?—*Ibid*. [The distinction between stoppage *in transitu*, and the ordinary case of vendor's lien, is pointed out by Lord Campbell in *McGowan v. Smith*, 13 Jur. 65, which we shall shortly notice.]

"A. sells goods to B. B. indorses to C. for a valuable consideration with [*quare*, "without" meant] notice. Is A.'s right to stoppage *in transitu* paramount to C.'s right to the goods?—*Ibid*.

"What is the doctrine as to market overt? and what peculiarities as to this exist in the city of London?—*Ibid*. p. 63.

"What was provided by the pawnbrokers act (39 & 40 Geo. 3, c. 99)?—*Ibid*.

"If goods be stolen from a man, and he prosecute the thief to conviction, the goods having meanwhile been sold in market overt, who shall have the goods?—p. 64.

"What was provided by 1 Jas. 1, c. 21, as to goods illegally pawned?—*Ibid.*

"What statutory enactments exist as to the sale of horses?—p. 65.

"What was the maxim of the civil law as to warranty in respect to the title of the vendor to the goods sold, and is our law the same?—p. 66. [So far as relates to our law, the reference will not afford a satisfactory answer, which, however, may be obtained by referring to *Morley v. Attenborough*, stated *post*, p. 130.]

"To what extent does the maxim *caveat emptor* prevail in reference to the goodness of the wares purchased?—*Ibid.* [So far as relates to the liability for unsoundness of victuals for food, reference should be made to *Burnby v. Bollett*, *post*, p. 129.]

"To make a warranty valid, is the use of any particular word required?—p. 67.

"What is the difference between factors and brokers?—*Ibid.*

"What is a *del credere* commission?—p. 68.

"What was the common law doctrine as to the effect of a sale by a factor or broker on the title of the goods sold? and what alteration as to this has been recently effected by the legislature, and by what statutes?—p. 69."

NEW COUNTY COURTS.

Costs—Suggestion—Form of affidavit to deprive plaintiff of costs—Cause of action in a material point out of jurisdiction.—Defendant applied to be allowed to enter a suggestion on the record to deprive the plaintiff of costs, the cause having been tried before the secondary of London, and the verdict being under £20. The affidavit stated, "that the cause of action arose in some material point, within the jurisdiction of the Westminster county court, in which the defendant dwells and carries on business, and that the goods, &c. except to the amount of 10s., were delivered at U., which is within the jurisdiction of the Westminster county court, and is the place where at the commencement of this suit, the defendant was and is employed, and dwells and carries on his business; and that neither the plaintiff nor the defendant is an officer of the said county court, nor was any officer of the said county court a party concerned in the said cause." It was held, that the affidavit was defective, in not stating that the defendant dwelt within the jurisdiction of the Westminster county court, at the time the action was brought, and also that neither the plaintiff nor the defendant were an officer at the time, of the said

county court: — *Quere*—Is a plaintiff who brings his action in a superior court, and recovers less than £20, deprived of his costs, when some material point of the cause of action arises without the jurisdiction of the county court (*Dodd v. Wyley*, 18 *Law Journ.*, N. S., C. P. 117). *Per* Cresswell, J.: "The affidavit says, that the defendant 'was and is employed,' and 'dwells and carries on' his business within the jurisdiction of the Westminster county court of Middlesex, which is clearly applicable to the time of swearing the affidavit, and not to the time of bringing the action." *Per* Wilde, C. J.: "The affidavit contains no denial, that the plaintiff or defendant was at the time an officer of the county court. The concluding passage 'nor was any officer of the said county court, a party directly or indirectly concerned in the matters in question in this cause,' means a party other than the plaintiff or the defendant." As to the cause of action in a material point, arising out of the jurisdiction of the court, see *Wood v. Perry*, *ante*, p. 71.

Delivering up possession of tenements—Mortgage—Landlord and tenant—Prohibition—Restitution.—The 122nd section of the County Court Act does not apply except a tenancy exists between the parties. A person entering into possession of mortgaged premises subsequently to the mortgage, who has not become tenant to the mortgagee, cannot be proceeded against under this section. Where a warrant of possession was executed on the 6th June, and a rule nisi was obtained for a writ of prohibition on the 5th, which was served on the judge of the county court, upwards of 200 miles from London, on the 7th: held, that the applicant was not too late. The court made the rule absolute for a writ of prohibition, inserting a clause for restitution (*Jones v. Owen*, 18 *Law Journ.*, N. S., Q. B., 8; S. C. 13 *Jur.* 261). *Per* Patteson, J.: "This appears clearly not to be within the 122nd section. It contemplates the ordinary case of landlord and tenant, not that of a mortgagor and mortgagee. There does not appear upon the affidavits anything to shew that the relation of landlord and tenant ever existed, or that, under the agreement, the plaintiff could have sued either the defendant's husband or any other person for rent. The judge of the County Court clearly had no jurisdiction. It then comes to a question of time. The warrant was delivered to the officer, on the 3rd of June, but not executed until the 6th; on the 5th, this rule was obtained before possession was delivered to the plaintiff, although not served before the 7th, which it was impracticable to do. The parties came as soon as possible, and where, I think, in time, but there was a total want of jurisdiction. The rule must, therefore, be made absolute."

Extended jurisdiction.—The Attorney-General has announced that probably the jurisdiction of the County Courts will be considerably extended. It is believed that some equitable jurisdiction will be given, and the present amount of debt increased to £50.

Insolvency.—*Objections to naming day for final order.*—In applications under sect. 28 of the 7 & 8 Vict. c. 96, the conduct of the insolvent towards his creditors, since his insolvency, as well as his conduct as an insolvent debtor before that period, will be taken into consideration: held, therefore, that the court, in viewing all the circumstances of the case, under this section, were not limited by the grounds of opposition to naming a day for the final order enumerated in sect. 24 (re Finch, 13 L. Tim. 26).

Replevin—Bond—Prosecuting suit with effect.—A declaration on a replevin bond for not prosecuting a writ with effect, according to the condition, stated (after setting out the bond); that the plaintiff made his plaint at a Whitechapel County Court, and that it was adjudged by the said court that plaintiff should take nothing by his said plaint. *Plea, nul tiel record.* Replication, there is such a record. The order made in the minute book of the County Court was “struck out for want of jurisdiction, a disputed title having been sworn to”: held, that the above entry did not support the allegation in the declaration of a judgment against plaintiff in the County Court, and that defendant was entitled to judgment (Tubby v. Stanhope, 12 Jur. 357: 17 L. J., C. P., 190). *Per curiam*, “We cannot construe the words ‘struck out for want of jurisdiction, a disputed title having been sworn to,’ to mean the court gives judgment for the defendant. Counsel’s argument is that the court gave judgment when it said ‘I have no authority to decide the case;’ and whether the causes were struck out properly or improperly, does not affect the question we are to decide. The only judgment in each case, returned in obedience to the certiorari, is a judgment in favour of the plaintiff below, for whom each of the defendants in the cases before us was a surety.”

Replevin—Bond to sheriff (*ante*, p. 100).—In replevin the plaintiff had given a bond, under sect. 121 of the stat. 9 & 10 Vict. c. 95 (the County Courts Act), to prosecute his suit with effect, and without delay, and prove that the title to corporeal property was in question. Held, that he was not entitled to obtain a certificate from the judge at *nisi prius*, that he had done so, if he did not succeed in the cause; and that, not having done so, he had not prosecuted his suit with effect (Tunnicliffe v. Wilmot, 2 C. & K. 626). *Per Patteson, J.* “The condition of the bond requires two things—that the party shall prosecute his suit with effect, and also prove that the title was in dispute. It has been often held in cases of common replevin bonds, that the party does not prosecute his suit with effect unless he gets a verdict, and I do not see how I can put a different construction on this bond. I cannot, therefore, certify that the plaintiff has prosecuted his suit with effect; and whether the title was in dispute is therefore immaterial.” We may observe that there

were two bonds, one to the sheriff and another in the County Court, on the removal of the plaintiff, the forms of the conditions of which are stated in notes to the above report.

MISCELLANEA.

Tenant for years—Liability for permissive waste.—The question whether a tenant for years is liable for permissive waste, that is, more than the natural wear and tear arising from the use of the premises, is one of so much difficulty and importance, that we make no apology for introducing the following able remarks of a contemporary on the subject. "This question, though on several occasions before the courts of law at Westminster, has never received any determination. In the most recent case on the subject, *Harnett v. Maitland*, (16 M. and W. 257; S. C. 16 Law Journ., 134, N.S., Ex.) this question was fully argued; the case however was determined on the pleadings, the declaration being held bad on demurrer, as it did not thereby appear whether the defendant was tenant for years or at will, and in the latter case he would not be liable. But the opinion of Parke, B. appears to be in favour of the affirmative; *Martin v. Gilham* (7 Ad. and E. 540; S. C. 2 Nev. and P. 568), was also decided upon, a defect in the declaration which charged the tenant with using the land in an 'unhusbandlike manner;' which, in the opinion of the court, precluded the plaintiff from recovering for permissive waste. In *Beale v. Sanders*, (3 Bing. N. C. 850; S. C. 5 Scott. 58), the court held, that a tenant under a void lease containing a *covenant to repair*, was a tenant from year to year, under the terms of the lease, and was liable for permissive waste. In *Jones v. Hill*, (7 Taunt. 332), the court expressly declined giving any opinion; holding that a tenant from year to year was not bound to keep the premises precisely in the order he got them, and that there should be some allowance for wear and tear. *Gibson v. Wells*, (1 N. R. 290), was the case of a tenancy at will. *Young v. Torriano*, (6 Car. and P. 12), is the only case where the non-liability of a tenant for years is stated in direct terms. Before the statutes of Gloucester and Marlebridge, no action of waste lay against a tenant for years (3 Inst. 302). In the cases in which this question was raised, it was contended that the liability thereby created was for commissive waste alone, the words being '*qui facient vastum*.' Lord Coke (Litt. 53, a, chap. 7, Tenant for Years), after stating the several kinds of waste, voluntary, actual, and permissive, says, that 'waste may be done in houses, by pulling or prostrating them,

or by *suffering* the same to be uncovered, whereby the rafters or other timbers are rotted.' The latter would seem to mean a permissive waste, and many of the examples given are permissive, as is shewn by the word '*suffer*,' which here means to permit; as where he says, 'to *suffer* the pale to decay, whereby the deer is dispersed, is waste,' (ib. 53, a); and it is waste to *suffer* a wall of the sea to be in decay (ib. 53, a), seem all to be instances of permissive waste. In the case of *Corbett v. Stonehouse* (2 Roll. Ab. 816), it was adjudged, and affirmed on appeal, that an action of waste lies for permitting the walls of messuages to be in decay and unrepaired for default of daubing and plaistering. In *Pomfret v. Ricroft* (1 Saund. 323, d, note by Williams), and *Greene v. Cole* (2 Saund. 252, c. ed. 1845), the reporter gives a precedent of a declaration for permissive waste against a tenant for years. From these authorities, it would seem to be the better opinion, that an action for permissive waste will lie against a tenant for years' (1 Irish Jurist, 156).

Equity restraining trespasses in the nature of waste.—Speaking of the case of *Davenport v. Davenport* (noticed at p. 138), as to non-interference with trespass though working an irreparable mischief to an estate, at the instance of a party out of possession, it is said, "The result is, that, to take an extreme case, though a defendant might be a most notorious liar in his county, he would have a period, ranging from six months to two years, during which he might without the possibility of hindrance, utterly strip of all its timber an estate, the title to which might turn out ultimately not to be in him. That such is the state of the law has been decided with great reluctance, but, we believe, most correctly, in the case referred to, of *Davenport v. Davenport*; but that such a state of the law is an intolerable abomination, must, we think, be apparent to any one who considers it carefully. It rests entirely, as we have said, upon the arbitrary rule of pleading, and the feudal contempt, in regard to real estate, of every thing in the nature of a mere chattel. When the title to personal property is in dispute, although the rule of pleading is maintained in full force, its application becomes mostly harmless, because there arises, almost of necessity, the compensating rule, which is applied even in regard of real estate, if the injury threatened is destructive of the substance of the property in litigation. If, for instance, I claim the title to a mere chattel, which is in the possession of A., A. will be restrained from destroying or departing with it, just as he would be restrained from digging out coal from a colliery, and, in either case, although he denies my title; and the only reason why timber, and other things which grow out of the land, are not so protected, seems to be, that they are not actually what is termed the inheritance (13 Jur. pt. 2, p. 114).

Chancery fees, &c.—Another reduction is to be made in Chancery fees, and Parliament is about to be asked officially to sanction a measure for the purpose. The opportunity will be taken to amend the present practice as to copies of answers, &c. It is proposed that these shall in future be supplied by the solicitor, instead of the Clerk of Records and Writs—an alteration which will be a considerable boon to the profession, without entailing any additional costs on the client (13 Law Times, 50).

Transfers of shares.—The Inland Revenue Commissioners give notice that solicitors are liable to a penalty of £500, and to be struck off the rolls, if they prepare, &c., transfers of shares in railway and other joint-stock companies, and omit to state therein the true sum paid, or agreed to be paid, for such transfers.

Easter Term Examination.—The examination for Easter Term, 1849, will take place on Tuesday the first of May. Where the articles have not expired previously to that day, but will expire during the term, the candidate will be examined conditionally, provided the articles have been left within the first seven days of term, and answers up to that time. The candidate must answer in three branches at least, and of these common law and equity must be two.

Service under articles.—There is a serious mistake in one of the books of practice as to the necessity of an articled clerk's continuous service for five years. Neither the act of Parliament nor any decision warrants such a notion. It is possible, indeed, that an interval in the service might be so long that the court would not sanction it. A man must not spread his five years' service over a quarter of a century, but we have known an interval of three years duly made up without any objection from the examiners (37 L. Obs. 472).

Registration of mutual insurance societies.—The singular blunder committed by one of the "amenders" of the bill for the Joint-stock Companies Registration Act, in expressly extending its operations to mutual assurance societies without providing for the peculiarities of the constitutions of such companies, has been much discussed. But some companies on the mutual principle have been registered under the act; and until the appearance of an article on the subject in the "Law Magazine (vol. ix., N. S. p. 38), we did not know that any one thought it "impossible for an assurance company, starting on the pure mutual principle, to comply with the requisitions of the act, necessary for obtaining a certificate of complete registration." As the difficulty has since been actually raised and insisted on in practice, it may be useful to consider whether it is really insuperable. * * The principal difficulties arise out of the requisition that the deed is to be signed by at least one-fourth in number of the subscribers, who shall hold at least one-fourth of the maximum number of shares in the company; and that every director shall hold at least one share in

the company. Everything turns upon the meaning of the word "share," which is not one of the words explained in the interpretation clause. In some parts of the act it seems to be used to denote exclusively a share in a joint-stock or capital, as where the word "shareholder" is defined to mean a person entitled to a share in the company, and who has executed the deed of settlement; or, in the case of mutual benefit societies, any person who shall be an assured member thereof. Here the "share" held by a person interested in a joint-stock or capital seems to be distinguished from the interest of a member of a mutual society in the concern; but this use of the word does not imply that it is incapable of a more extended meaning. The meaning is that, in the case of a company with joint-stock, the shareholder must have executed the deed; in the case of a mutual benefit society, it is sufficient if he be an assured member. No meaning is expressly appropriated to the word. When it is necessary to denote a title to an aliquot part of the joint capital, the word is used in the sense of a share of capital; but that is not the only meaning of which it is capable. A share is not necessarily an aliquot part of anything. It may mean a portion incommensurable with any other portion; and it may be used, with reference to an association, to denote other things than a portion of a joint-capital. A share in the profits, a share in the benefits, a share in the risks, a share in the management, of any concern are familiar expressions, and may mean any kind, amount, or degree of participation in the things spoken of. * * We have now discussed, and, we think, satisfactorily disposed of, all the objections which have been urged to the possibility of applying the Registration Act to a mutual society—objections which have fortunately not found any favour in the Registrar's office. But, even if we grant to the objectors that the word "share" is used throughout the act exclusively in the sense of an aliquot part of a fixed subscribed capital, and that every company to be registered must possess such capital and be worked by means of such shares, we still say that a company may be registered on the purely mutual principle (13 Jur. pt. 2, p. 96—98).

NOTES OF RECENT LEADING CASES.

COMMON LAW.

PRINCIPAL AND AGENT—*Contract by one principal in his own name for benefit of himself and another—Joining both principals in action*—[Cook v. Seeley, 17 Law Journ., N.S., Exch. 286].—Where a contract is made by an agent, being really merely such,

Little difficulty can arise as to the principal's right to sue on such contract, for it is clearly settled that the contract of the agent is that of the principal (see Addison's *Cont.* 257—260; *Princ. Com. L.* 69); but where a person is himself a principal, and acts alone in respect of a matter in which another is also interested (this joint interest being unknown to the party with whom he deals), some difficulty has been experienced in ascertaining who should sue. The general rule in determining the joinder of parties to simple contracts is, that all who have a joint legal interest, or are jointly entitled, must join, even though the contract be in terms several, or be entered into with one person only on behalf of all; so that where the consideration moves from several parties jointly, such parties, as having the joint legal interest, should be joined as plaintiffs in suing for a breach of contract (*Broom's Parties to Actions*, 18, 2nd edit.) In accordance with this rule, it has lately been decided that there is in general sufficient privity of contract to maintain an action if the party actually making the contract with the defendant was acting for the plaintiff, and intended at the time to make the contract for him, though the defendant was not aware that the contract was made for the plaintiff. Though the name in which the contract is made is *prima facie* evidence of the party for whom the contract is made, yet it is not conclusive (except by the custom of trade in the case of bills of exchange). Therefore, where two plaintiffs sue on a contract between them and the defendants as bankers, and it appears at the trial that the bank account was opened in the name of one only of the plaintiffs, it is competent for the plaintiffs to show that the account was opened on behalf of them both; and it is sufficient to maintain the action if it is proved that the plaintiff who actually opened the account at the time intended it to be the account of the two, without showing that the defendants had, before the action, any notice that he had so intended (*Cook v. Seeley*, 17 L. J. *Exch.* 286). *Per Parke, B.*: "The general rule is not disputed to be that a principal may sue on the contract made in the name of his agent, and I cannot help thinking that there was evidence to go to the jury that Farquhar [the co-plaintiff] in opening this account with the defendants acted for both the plaintiffs. The case of *Sims v. Bond* (5 Barn. and Adol. 389) decided that the fact of the money which was paid into a banker's account belonging to particular persons, is not evidence that the account was opened for them; but here, in addition to that, there are the letters B.C.C. in the pass-book. I think a jury should decide whether these letters after his name do not show that in opening the account Farquhar acted for both the plaintiffs; and there was also the letter, which was evidence the same way. Then defendant's counsel argued that there is a peculiarity in the contract of a banker, which, like the contract in a

bill of exchange, is exclusively with those named in the contract. I perfectly agree that very distinct and satisfactory evidence must be given to enable the plaintiffs to prove that what is apparently the contract of the one is really the contract of the two. The name at the head of the banker's pass book is not, however, conclusive, as the name in a bill of exchange by the custom of merchants is. *Sims v. Bond* (*supra*) is an authority that the banking account may be opened, and that it may be shown who is the real customer, though the same case decides that must be proved by more than the mere ownership of the money."

SALE.—*Warranty of goodness, &c.—Unsoundness of food*—[*Burnby v. Bollett*, 16 Mees. and Wels. 644; S. C. 17 Law Journ., N. S., Exch. 190].—The vendor of goods, and even victuals for food (if not acting in the way of his trade), is not bound to answer for their goodness, unless he expressly warrants them to be sound, good, or wholesome; or unless he knew them to be otherwise, and has used any means to disguise them (*Parkinson v. Lee*, 2 East, 314). Of course, we are excepting from this goods ordered of a tradesman in the way of his trade for a particular purpose, in which case the tradesman is considered as engaging that the goods supplied are reasonably fit for the purpose (*Brown v. Edgington*, 2 Man. and Gr. 279; *Shepherd v. Pybus*, 3 Man. and Gr. 868; *per Parke, B.*, in *Morley v. Attenborough*, 18 Jur. 284). And, also, the case of a tradesman selling victuals for food in the way of his trade, for if such victuals, so sold, turn out to be unsound, not only is the tradesman liable criminally, at least where he had knowledge, but he is liable to an action at the suit of the vendee, though there be no fraud on his part, or warranty of the soundness of the thing sold. This is so laid down in the case first referred to. There A., a farmer, bought, in the public market of a country town, from B., a butcher, keeping a stall there, a carcase of a dead pig, for consumption, and left it hanging up, intending to return, after completing other business, and take it away. In his absence, C., a farmer, on seeing and wishing to buy it, was referred to A., as the owner, and subsequently, on the same day, bought it of A., the original buyer, without any warranty. It did not appear that any secret defect in it was known to any of the parties. It turned out unsound, and unfit for human consumption; Held, that no warranty of soundness was implied by law between the farmers A. and C. (*Burnby v. Bollett*, 16 Mees. and W. 644; S. C. 17 L. J., Exch. 190). *Per Parke, B.*: "There is no difference between the sale of victuals for food and other articles, than this, that victuallers, butchers, and other common dealers in victuals, are not merely in the same situation that common dealers in other commodities are, and liable under the same circumstances as they are, so that if an order be sent to

them to be executed, they are presumed to undertake to supply a good and merchantable article, but they are also liable to punishment for selling corrupt victuals as a common nuisance, by virtue of an ancient statute (certainly if they do so knowingly; probably, if they do not); and are, therefore, responsible civilly to those customers to whom they sell such victuals, for any special or particular injury by the breach of the law, which they thereby commit." After referring to the statute of 51 Hen. 3 (of the pillory and tumbrel, &c.), for enquiring as to corrupt victuals, &c., and the punishment of parties offending, the learned Baron continues: "This view of the case explains what is said in the Year Book, 9 Hen. 6, that 'the warranty is not to the purpose, for it is ordained that none shall sell corrupt victuals,' and what is said by Tanfield, C. B., and Altham, in Cro. Jac. 197, that 'if a man sells victuals which is corrupt, without warranty, an action lies, because it is against the commonwealth;' and also explains the note of Lord Hale (F. N. B. 94), that there is 'a diversity between selling corrupt wine to merchandise, for there an action on the case does not lie without warranty; otherwise if it be by a taverner or victualler, if it prejudice any.' The defendant, in this case, was not dealing in the way of a common trade, and was not punishable in the least for what he did. He merely transferred his bargain to the plaintiff. He falls within the reason of the former part of Lord Hale's distinction, and there being no evidence of warranty, nor any of fraud, he is not liable, and the plaintiff ought to have been nonsuited."

WARRANTY—On sale of goods—Pawnbroker—[*Morley v. Attenborough*, 13 Jur. 282].—In 2 Stephen Com. 66, 2nd edit., it is laid down (following 2 Black Com. 451) that, by our law, a purchaser of goods and chattels may have a satisfaction from the seller, *if he sells them as his own*, and the title prove deficient, without any express warranty for the purpose. It is added, however, in a note, that this doctrine "is questioned in a work of ability; vide Chitty on Contracts, 447, where *Springwell v. Allen*, Aleyn, 91; 2 East, 448, note; Co. Litt. 101b; and Noy's Max. ch. 42, are cited *contra*; vide, on this subject, *Allen v. Hopkins*, 13 Mees and W., 103." The subject of warranty of title on sale of goods has been elaborately considered in the late case of *Morley v. Attenborough* (13 Jur. 282), and the law clearly laid down in the following terms:—1. There is no implied warranty of title on the sale of a specified ascertained chattel; in order to render the seller liable for a bad title, he must have given either an express warranty or an equivalent to it, by declarations or conduct; or have practised fraud, as by concealing from the purchaser that he had no title. Such express warranty may be inferred from usage of trade proved in fact, or from the nature of a trade being such as to lead to the conclusion

that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys as against all persons; as, for instance, when goods are bought in a shop professedly carried on for the sale of goods. *Semble*, that on the sale of a specified chattel, although there is no implied warranty of title, the purchaser who has been compelled to deliver it up to the real owner, may recover back his money as on a consideration that has failed, if it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a 'good title.' A pawnbroker who sells a chattel as a forfeited pledge only undertakes with the purchaser that the subject of the sale is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it. In an executory contract of purchase and sale, where the subject is unascertained and is afterwards to be arranged, *semble*, that both parties must be taken to have meant that a good title to that subject should be transferred. "From the authorities in our law, to which may be added the opinion of the late Lord Chief Justice Tindal, in *Ormond v. Huth* (14 Mees. and W. 651), in error, it would seem that there is no implied warranty of title on the sale of goods, and that, if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by declarations or conduct, and the question, in each case where there is no warranty in express terms, will be whether there are such circumstances as to be an equivalent to such a warranty. Usage of trade if proved, as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement; and, without proof of such usage, the very nature of the trade may be enough to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons. It is, perhaps, with reference to such sales, or to executory contracts, that Blackstone makes the statement above referred to. We do not suppose that there can be any doubt that if articles are bought in a shop professedly carried on for the sale of goods, the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells "as his own," and that is equivalent to a warranty of title. But in the case now under consideration the defendant can be made responsible only as on a sale of a forfeited pledge *eo nomine*; though the harp may not have been distinctly stated in the auctioneer's catalogue to be a forfeited pledge, for the auctioneer had no authority from the defendant to sell it except as such. The defendant, therefore, cannot be taken to have sold it with a more extensive liability than such a sale would have imposed upon him; and the question is; whether on such a sale, accompanied with possession, there is any assertion of an absolute title to sell, or

only an assertion that the article has been pledged with him and the time allowed for redemption has passed. On this question we are without any light from decided cases.

In our judgment it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking anything more than that the subject of the sale is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it.

BILL OF EXCHANGE. — *Company — Partners — Acceptances on behalf of in name of one*—[*Jenkins v. Morris*, 16 Mees. and W. 877]. Indorsee against three defendants as acceptors of a bill of exchange drawn on "E. M. and others, trustees of Clarence Temperance Hall, Liverpool," and accepted thus: "Accepted E. M." The three defendants, with E. M. and another, were the five trustees of a body of persons associated together for the purpose of building the Temperance Hall. E. M. had authority from all the trustees to accept the bill on their behalf. Held, that the defendants were bound by the acceptance, though it did not show on the face of it that E. M. intended to accept, not individually, but for himself and four others (*Jenkins v. Morris*, 16 M. and W. 877). *Per* Pollock, C. B.: "E. M. accepted the bill, and the jury found he had authority from all the trustees to do so. Then his acceptance did not import that he accepted merely as an individual, but that he was the party whose hand performed that duty by direction of the rest; and the mere fact that he needlessly added his name to the acceptance made no difference."

EQUITY.

JURISDICTION OF EQUITY.—*Absence of remedy—Assuming jurisdiction*—[*Ryves v. Wellington*, 9 Beav. 579].—The absence of a remedy for a supposed wrong in another place is not, of itself, any reason for the Court of Chancery assuming a jurisdiction on the subject. The case must be such as to bring it properly within the jurisdiction of the court on other grounds (*Ryves v. Wellington*, 9 Beav. 579; also in 15 Law Journ., N. S., Chanc. 461; 10 Jur. 697).

Equitable jurisdiction, origin of—[*Monkton v. Att. Gen.*, 2 Cooper, 527].—If courts of common law in ancient times were constituted as at present, and the Court of Chancery did not exist as a court of equity, an equitable jurisdiction must have been possessed by some other courts (*Monkton v. Att. Gen.*, 2 Coop. 527).

MORTGAGE.—*Accounting for profits—Policy of insurance—Collateral security*—[*Bell v. Ahearn*, 1 Irish Jurist, 153].—If a creditor insures his debtor's life, and receives any sum from the insurance office, it will not necessarily go in part liquidation of the

claim which he has against the party whose life he insured (*Hanson v. Blackwell*, 4 Haro. 424; 5 Jarm. Convey. 305, where the case of *Humphrey v. Arabin*, mentioned *infra*, is fully stated). And it does not appear that there is any difference in the case of a mortgage. In a late case in Ireland, the question was raised whether, there being a policy on the life of the debtor, and the creditor effecting the policy being paid the sum insured, that payment must not be held part payment of the debt. It is to be borne in mind that in England there is a statute (14 Geo. 3, c. 48) by which no insurance can be made on the life of any person, or on any other event whatsoever, wherein the person for whose benefit such policy is made has no interest. The name of the person for whose benefit the policy is made must be inserted therein, and he cannot recover any greater sum than the amount of his interest in such life or other event. In Ireland there is no statute, and consequently nothing to prevent a person insuring the life of another, though he have no interest therein. It has accordingly been lately held in that country that a mortgagee is not bound to account for the sums paid to him on foot of a policy effected in Ireland, on the life of his debtor, when the premiums have been paid from his own moneys, and there is no contract between mortgagee and mortgagor on the subject (*Bell v. Ahearns*, 1 Ir. Jur. 153). In giving judgment the Lord Chancellor said: "I do not feel warranted in this case, from anything that has been urged, in now overruling *Humphrey v. Arabin* (Ld. and Gos. Plunket, 318). That was decided, in 1836, on very great consideration, and has not since been overruled by any case here or in England. It was contended that this case was distinguished from it by saying that the defendant here is a trustee, as in *ex parte Andrews* (2 Rose, 418; S. C. 1 Mad. 578), but that has not been sustained. It is important to observe that all the cases in England have been determined on the statute, on the ground of the party having been able to effect the insurance by reason of the interest he acquired by his debt. In the case of *ex parte Andrews*, the respondent, as a trustee, was taken out of the statute by his interest in the life of the bankrupt's wife, without which he could not have effected the insurance. The court held, that having, by his character of trustee, acquired a right to make the insurance, he could not have a benefit for himself from it. Sir Thomas Plumer in that case says, 'It is clear that a trustee never can use, to his own benefit, the property committed to his trust. They had it subject to all the jealousy with which the court regards a trustee acting on the property for his own benefit. They never could have insured unless the property had been assigned to them. The means, therefore, of acquiring the sums received from the insurance office originate with the bankrupt and his wife; they divest themselves of all dominion over it by committing it to trustees. It is extremely difficult to

maintain that they, as trustees, being allowed this payment, are not to account for it as an advantage made of fiduciary property, acquired partly by their own act, and partly by the act of the bankrupt. Having been thus enabled, by the act of bankruptcy, to obtain part of their debt, they cannot prove the whole, they must account. It is difficult to say on what *Henson v. Blackwell* (4 Hare, 484; S. C. 14 Law Journ., N. S., Chanc. 329; 9 Jur. 800) turned; save this, that the creditor had only a right to effect an insurance against the risk of the husband not being able to reduce into possession the property, and that that risk having been determined by the death of the wife, there was an end of the contract altogether. Though the Vice-Chancellor observes on the case of *Humphreys v. Arabin*, it does not appear that his attention was called to the difference between the law in this country and in England. It would be hard to maintain that any right could be founded on behalf of the creditor against his debtor; if the creditor choose to pay the premiums, how could he recover them against the debtor, if the insurance company failed, or they amounted to more than the debt? And it could never be said that the debtor should have the option, if the policy proved valuable, to claim it; if worthless, to reject it. However, *Humphreys v. Arabin* has decided the question. That is a binding decision; in principle there is nothing against it, and I am content to abide by it as the law of the court."

PARTNERS.—*Disposing of share to co-partner*—*Mistake in value of share*—*Converting the partnership property*—[*Knight v. Marjoribanks*, 13 Jur. 136].—Although the correct and accurate value of a share of one of the partners in a joint concern cannot be ascertained without converting the property of the concern into money, ascertaining the surplus, if any, after satisfying all demands of other persons, and after taking the account between the concern and each partner, and finding a balance due to or from each partner severally, yet it is lawful for partners to deal with each other in quite a different way. If they think proper, they may lawfully rely on the stock takings, valuations, and accounts which appear by the books and the accounts kept in the manner known to, or acquiesced in by, the partners; and the subsequent discovery of unintentional inaccuracy will not be ground to set such a transaction aside. And where the partnership business was carried on in Van Diemen's land, and none of the partners could have personal knowledge of the partnership transactions, but they were obliged to rely on the reports of the agents, it was held that they might fairly deal with each other with respect to their shares in the concern, notwithstanding the ignorance they were in as to their exact value (*Knight v. Marjoribanks*, *supra*).

PARTNERSHIP.—*One partner member of two firms*—*One firm suing the other*—[*Rheam v. Smith*, 18 Law Journ., N.S., Chanc. 97].—The following case upon the effect of one firm being indebted to

another; where one individual is a member of both firms, is likely to be important in its results. It appears that a banking firm in which A. was a partner, brought an action to recover a debt from another copartnership, in which A. was also a partner. The latter copartnership thereupon filed a bill to have their accounts taken, and for an injunction to restrain the action. A demurrer to this bill, for want of equity, was put in, but was over-ruled. (*Rheam v. Smith, supra*). The V. C. of England said: "It strikes me in this way, that if there was a partnership of A. and B., and another partnership of B. and C., and the partnership of A. and B. became indebted to the partnership of B. and C., this court would never permit execution to be issued in any action which B. and C. might bring against A. and B., until it was ascertained that on the true state of the accounts, in which B. himself is involved as a partner with A. and B., B. and C. would be entitled to take out execution for the whole sum. That cannot be. It has been very ingeniously put, that there cannot be an apportionment of the assets of the partnership until the debts due to the partnership are got in. That is very true as a general proposition; but I apprehend this court would not allow the execution to be taken out by B. and C. against A. and B., the defendants in the action at law, until it was ascertained that they were entitled to execution for the whole, on a due statement of the entire account. And, in that state of the case, it appears to me that I must over-rule the demurrer."

POVERTY AND DISTRESS.—*Contract not set aside for, where no fraud*—[*Knight v. Marjoribanks*, 13 Jur. 136].—A man who is in distress may, nevertheless, contract, and if, being in distress, he procures other persons to consent to an agreement which he would not himself have requested or consented to if he had not been in distress, and afterwards successfully urges and obtains the performance of that agreement, and receives the money secured by it, and after that acquiesces for a length of time in the performance, without any notice of dissatisfaction or complaint, he is not entitled to set aside the transaction, on the mere ground of his poverty and distress, in the absence of any deception or fraud proved to have been practised upon him (*Knight v. Marjoribanks, supra*).

SETTLED ACCOUNT.—*Opening—When account opened generally, and when only allowed to surcharge and falsify*—[*Allfrey v. Allfrey*, 13 Jur. 269; also at Rolls in 10 Beav. 353; 17 Law Journ., N. S., Chanc. 30; 11 Jur. 941].—The jurisdiction of courts of equity over settled accounts is a most important one, and is exercised with great circumspection, particularly with reference to the point of re-opening the account, or merely allowing to surcharge and falsify. The former course throws the whole account open, and the defendant has to prove all his payments; whilst, where liberty to

surchage and falsify only is granted, the burden of proof of error, &c., in the account is thrown on the party impeaching it (See 1 Daniell's Pract. 635, 2nd edit.; Prin. Eq. 106). As to the rule whether the decree shall be for an open account generally, or to surcharge and falsify merely, it is thus laid down in *Vernon v. Vawdry* (2 Atk. 119): "If there are only mistakes and omissions in a stated account, the party objecting shall be allowed no more than to surcharge and falsify; but if it is apparent to the court that there has been fraud and imposition, the decree must be that the whole shall be opened" (see also *Wedderburn v. Wedderburn*, 4 Myl. and Cr. 41). In the case of *Allfrey v. Allfrey*, a settled account was opened twenty-four years after the settlement, and fourteen years after the death of the accounting party, on the ground of fraud; and it was there laid down, as the rule of courts of equity, that if there are only mistakes in a stated account, the party objecting shall be allowed no more than to surcharge and falsify; but if it is apparent to the court that there has been fraud and imposition, the account will be opened. However, where no injustice will be done to the objecting party by confining the decree to surcharging and falsifying, the court will sometimes make a decree in the latter form (*Allfrey v. Allfrey*, 13 Jur. 269). Lord Cottenham, after referring to *Vernon v. Vawdry*, and *Wedderburn v. Wedderburn* (*supra*), said: "It is obvious that that is, strictly speaking, the doctrine and principle of the court; because if a transaction, whether it be a deed, or an agreement, or an account stated and settled, which is only an agreement, be proved to be fraudulent, there is nothing on which anything can stand: the transaction itself is void. Then, if the transaction itself is void, there is no question that can remain about an account partially settled, or settled, except so far as error may be proved." After observing that in some cases, as *Brownell v. Brownell* (2 Bro. C. C. 61), and *Miller v. Craig* (6 Beav. 433), decrees to surcharge and falsify merely had been made in cases of fraud, Lord Cottenham proceeded: "If the court, under the circumstances, sees that justice is more likely to be done by that form of decree than by a general decree for an open account, the court is undoubtedly justified in taking that course which appears, under the circumstances, as being most likely to effect justice between the parties. If, however, there be a question whether the one party is likely to suffer injustice more from one form of decree than the other form of decree, then there can be no doubt that the court ought to lean towards that side which is the side of an innocent and an injured party, rather than to that side which is the offending party. It is impossible to say that, going through an open account of a great length of time standing, which the party has not for many years expected to be called upon to do, he may not be exposed to

very great hardship, and may not find it impossible to exonerate himself from certain obvious charges which may be made against him, and which he must be subject to until he can relieve himself from them by evidence. On the other hand, it is quite obvious that there may be an utter impossibility in the party injured, merely under permission to surcharge and falsify, to discover what the fraud was, or what the error was, he being a stranger altogether to the transaction, only knowing the transaction as falsely represented to him by the party who was guilty of the fraud; and, therefore, it would be in vain to tell him, 'If you can point out an error, it shall be corrected,' for that is exactly the difficulty under which he labours. He is ignorant of the transaction, and yet he is called upon to prove and substantiate an error. It is impossible, therefore, to be sure that, either in the one form of account or the other, absolute justice will be done after the lapse of a great number of years. But, as I said before, the court will lean in favour of the innocent and injured party, against that party who is the author of the fraud."

SPECIFIC PERFORMANCE.—*Voluntary agreement for valuable consideration enforced*—*Ellis v. Nimmo*—*Agreement to grant lease to relation*—[*Moore v. Crofton*, 3 Jon. and Lat. 438].—In the case of *Ellis v. Nimmo* (Lloyd and Gould's Rep. temp. Sudgen, 333), it was decided (after a review of the *dicta* in previous cases), that a postnuptial agreement in writing, by which a father undertook to make a provision for a child, will be specifically executed, being a contract founded on *meritorious* consideration. This decision has never been acquiesced in by the profession, and has now been overruled. In *Moore v. Crofton* (*suprà*), Sir Edward Sudgen may be considered as having abandoned his previous doctrine, for he says, "The defence then is, that this is a voluntary agreement, and therefore without, it is said, meaning to impeach the authority of *Ellis v. Nimmo*, it cannot be enforced. As to *Ellis v. Nimmo*, I think it was decided upon sound principles of equity; but I am aware that the opinion of the profession is otherwise. Before that case was decided, there was a general impression, that a voluntary contract, though meritorious, could not be enforced in this court, and that impression has not been removed [by my decision]. I drew the distinction between a mere voluntary agreement, and a voluntary agreement to provide for a wife or a child.—I did not carry it further—which I thought, and still think, ought to be enforced; but I consider that decision to be overruled by the current of opinion and authority, and I have no desire to support it against the general opinion." In the case of *Moore v. Crofton*, specific performance was decreed of the following contract for a lease: 'From the love and affection I have for you, as my first cousin, I now promise and engage to you, your heirs or

assigns, during my natural life, in reversion, the farm of C —, as now in your actual possession, at £1 2s. 9d. per acre, as now paid and payable by you. There was here not a mere *meritorious* consideration, for the continuance of the rent which was reserved by the former lease was a *valuable* consideration for the promise to grant the lease in reversion. Sir Edward Sugden, in his judgment, said: "Admitting that the objection [namely, that a voluntary agreement even for a meritorious consideration will not be specifically performed] applies equally to the cases of voluntary contracts and voluntary settlements, can it be sustained in the present case? Where there is a settlement between strangers, actually executed, the court does not weigh in very nice scales the *adequacy of the consideration*. This, it is true, is a contract, resting *in fieri*, and therefore there is a difference; but no person can dispute that the mere mention of love and affection, as a consideration, cannot remove the other valuable consideration, namely, the continuance of the same rent which was reserved by the lease previously granted. If this had been an agreement with a mere stranger it would have been binding, unless it were shown that there was such an inadequacy in the amount of consideration as was demonstrative of fraud. But I do not admit that a man may not enter into a contract with a relation, and give him better terms than he would to a mere stranger. This court, though it will not execute a merely voluntary contract, will yet execute one for valuable consideration, and will not weigh in very nice scales the amount of the consideration, where it has been reduced fairly by reason of the relationship of the parties."

TRESPASS.—*Injunction to restrain trespass in nature of waste—Party out of possession*—[*Davenport v. Davenport*, 13 Jur. 227].—The interference of courts of equity in restraint of waste was originally confined to cases founded in privity of title; but now those courts reach cases of adverse claims and rights *not* founded in privity, as, for instance, to cases of trespass attended with irreparable mischief (2 Story's Eq. Jurisprud. s. 918; Princ. Eq. 250, 251). The courts, however, take a difference between the case of an applicant *in possession* and one *out of possession*. If I am *in possession* of an estate, the only or principal value whereof is in the things which grow on the soil, and a stranger comes and cuts down my trees, he may be punished for having done so by process of law; but the Court of Chancery will not lend its assistance to prevent him from continuing the mischief, because he is a mere trespasser; but if my estate consists of a *mine*, and the stranger is digging my minerals, or if it consists of a stone quarry or colliery, and he is taking away the stone or coals, then the Court of Chancery will prevent him, although the act is still a mere trespass; and the reason of the distinction is, that in the instance of cutting timber there is no destruction of the in-

heritance, whereas taking coal, or stone, or minerals, is taking the substance of the inheritance. If I lay claim to an estate, but am *out of possession*, whatever may be the vraiseemblance of my claim, and whatever might be the evidence which I might be prepared to produce in support of it, if the person in possession will swear by his answer to facts or documents displacing my title, I cannot have the slightest assistance from the Court of Chancery until the hearing of the cause, or until the legal right has been determined in a court of law; and, in the meantime, the person in possession may strip the estate of every tree on the face of the earth. It would seem also that, in such a case, he may even destroy the substance of the inheritance. These principles have lately been fully considered in the case of *Davenport v. Davenport* (13 Jur. 227). That was a bill by a party *out of possession* of real estates against the party in possession, and claiming by title adverse to that of the plaintiff, stating that the defendant had been in possession for twenty years, and that the plaintiff had only recently discovered his title to the premises, and had commenced an action of ejectment against the defendant, and praying an injunction to restrain the defendant from committing acts of trespass, alleged to be productive of irreparable waste. A demurrer by the defendant to the bill was allowed with costs. It was also held, in the same case, that a party *out of possession*, claiming real estate by title simply adverse to that of the party in possession, cannot be heard in a court of equity upon an application to restrain the party in possession from committing acts of trespass productive of irreparable waste, until he has established his title at law. Sir James Wigram said: "Whatever the origin of those refinements in cases of mines might be, there did not appear to be any case in which a party coming into equity against another in possession, who claimed to be entitled to cut *timber*, had ever obtained an injunction to restrain him from so doing till his title had been established at law. In the case before the court, the defendant had been in possession for twenty years, and the bill contained no averment that she did not claim a right to the possession, whether she might ultimately succeed in defending that possession or not. The case would appear to be a proper case for an injunction if there had been an admission of the title; and the defendant, by demurring, had, in substance, admitted the title on the record, whatever might be the result on the trial. The difficulty, however, was how, in the face of the decision in *Jones v. Jones* (3 Mer. 161), the court could do otherwise than follow the decision in that case. It was true that there were many grounds of demurrer in that case, but the court had refused to interfere for the purpose of staying waste as between heir at law and devisee while their adverse rights were in course of litigation. In his judgment in that case Sir William Grant had said he could not see a very good reason why the

court which interferes for the preservation of personal property pending a suit in the Ecclesiastical Court, should not interpose to preserve real property pending a suit concerning the validity of the devise; but that, as a condition of such interference, the court would certainly expect it to be shown that the party applying was proceeding with due expedition to bring the question to a decision; whereas the plaintiff in that case had waited two years and a-half after the commission of the act of waste complained of without bringing his action. In the case then before him (the Vice-Chancellor) it did not appear how long the plaintiff had waited before bringing his great action of ejectment. All that the bill alleged was, that he had only very recently discovered his title to the premises in question; but much weight could not be attributed to such expressions as against a party who had been in possession nearly twenty years. Though it was to some extent to his surprise and regret that the law should be in its present state, yet he could not, on demurrer, overrule the decision of Sir William Grant. The plaintiff, if he thought he could sustain his bill, might have recourse to a higher tribunal; but the principle was well settled, that a party out of possession must establish his right at law before he comes into equity."

CONVEYANCING.

ABSTRACT OF TITLE.—*When perfect.*—[*Blackburn v. Smith*, 2 Car. and Kirw. 561.]—A perfect abstract of title is one which shows such a title as enables the purchaser to complete his purchase. Therefore where A. had contracted to sell lands to B., and B. afterwards contracted to sell them to C., and agreed, amongst other things, to furnish C. with a full and sufficient abstract of title, &c., and before any conveyance by A. to B., A. died; it was held, that B. having, before A.'s death, delivered to C. an abstract, bringing the title down to the contract by A. to sell to him, had performed his agreement (*Blackburn v. Smith*, 2 Car. and Kirw. 561.). *Per Rolfe*, B.: "The agreement cannot, I think, be taken to mean that the seller was to deliver a perfect abstract, that is, an abatement showing a faultless title; for if, *ex hypothesi*, this were the case, what meaning would there be in the stipulation that the purchasers should have a month in which to make objections to the title?" See *Braybrooke v. Inskip* (8 Ves., jun. 436), where Lord Eldon said: "As to the question when the abstract was complete, the abstract is complete whenever it appears that upon certain acts done, the legal and equitable estates will be in the purchaser. That may be long before the title can be completed." See also *per Lord Gifford*, in *Lewin v. Guest*, 1 Russell, 325, 329.

CONTRACTS ON SUNDAY.

At common law.—It has been said that a contract entered into on a Sunday was illegal at the common law, for Christianity was part of the law of land, but this has been denied (*Comyns v. Boyer*, Cro. Eliz. 485; *Drury v. Lafontaine*, 1 Taunt. 136). In *Rawlins App. and West Derby Respond.* (10 Jur. 268; S. C. 15 Law Journ., N. S., C. P. 70), it was said in argument that all acts performed on a Sunday, except judicial acts, were legal, and C. J. Tindal there said: "At common law many things done upon a Sunday were held to be valid. An entry upon lands to preserve an estate, a demand of possession, and (as we shall presently more fully see) contracts not made in the way of a person's ordinary calling, may all be made on a Sunday." It may be here stated that in that case, it was held that service of a notice of claim by a voter upon the overseers on Sunday (being the last day for service) was valid.

29 Chas. 2, c. 7.—The invalidity of a contract on Sunday now rests indisputably on the provisions of the 29 Chas. 2, c. 7, commonly called the Lord's Day Act. By s. 1, no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings, upon the Lord's day, or any part thereof (work of necessity and charity alone excepted). There are enactments applying to service, &c., of judicial process, travelling by boats, &c., with which, however, we are not now concerned.

It is to be first observed that the statute applies only to such persons as have some ordinary calling (See *Fennell v. Ridler*, 5 Barn. and Cres. 406; *Rex v. Whitnash*, 7 Barn. and Cr. 602). The words of the statute, after enumerating certain callings, are "or other person whatsoever," which would appear to be universal in its application; but we are to bear in mind that as the general principle in the construction of a statute, when there is an enumeration of particulars with a general class, the general expressions are to be confined to persons or circumstances *ejusdem generis*—in fact, the rule or maxim *noscitur à sociis* is applicable to them (*per Coleridge, J.*, *Cooper v. Harding*, 7 Q. B. Rep. 941; *Broom's Max.* 455, 456, 2nd edit.). It has been doubted whether an attorney is within these general words; no doubt he is pursuing his ordinary calling in advising clients, &c., but then he is not pursuing the same kind of labour as that of the persons mentioned in the statute. The point has not finally been decided, but the tendency of the opinion of the Court of Exchequer, in *Peate v. Dicken*, 1 Crompt. Mees. and Roscoe,

p. 422, was to consider an attorney as a person not within the act. It was not necessary to decide the point as the business was a personal undertaking by the attorney, which, as Lord Lyndhurst justly observed, was clearly something *ultra* his ordinary calling, even supposing that, as an attorney, he came within the statute. Mr. B. Alderson observed that the words "other person" (under which only could an attorney be considered as included) could mean only persons, *ejusdem generis* with the preceding enumeration (See *Sandiman v. Breach*, 7 Barn. and Cres. 100).

Pursuing ordinary calling.—These observations lead us to remark that the statute applies indeed to persons having ordinary callings, but only affects them when they are pursuing such ordinary calling. Thus, in the case of *Rex v. Whitnash* (7 Barn. and Cres. 596) it was held that the hiring of a servant by a farmer on a Sunday is good. In this case, Mr. J. Bayley said: "I am of opinion that this act of Parliament does not prohibit labour, business, or work of every description; and that the hiring of a servant by a farmer on a Sunday is not work or business, within the meaning of the act of Parliament. I also think that it is not labour, business, or work of the ordinary calling of the farmer. He, like every other person who requires servants, must hire them. The true construction of the words "ordinary calling" seems to me to be, not that without which a trade or business cannot be carried on, but that which the ordinary duties of the calling bring into continued action. Those things which are repeated daily, or weekly, in the course of trade or business, are parts of the *ordinary calling* of a man exercising such trade or business, but the hiring of a servant once in the year does not come within the meaning of those words." And this principle was applied to a still more doubtful case, for in the case of *Scarfe v. Morgan* (4 Mees. and W. 273; S. C. 2 Jur. 569) it was held that the statute did not extend to the case of an agreement made by a farmer, that, in consideration of a certain sum, a mare belonging to another person shall be covered by a stallion which is his property, and occasionally used for the purpose of covering mares. The contract was both made and executed on the Sunday. The contract was not, however, directly within the ordinary business of a farmer.

Contracts not public.—The statute includes every description of business when it is a man's ordinary calling within the meaning of the statute; that is, it is equally applicable to a concealed or secret contract as to a public one. Indeed, in *Bloxsome v. Williams* (3 Barn. and Cres. 232), the court inclined to adopt the opinion that the statute only applied to *public* violations of its provisions. However, in the subsequent case of *Fennell v. Ridler* (5 Barn. and Cres. 408), the same judge held that the statute applied equally to private and concealed transactions on a Sunday. Mr. J. Bayley there said:

"There is nothing in the act to show that it was passed exclusively for promoting public decency, and not for regulating private conduct; and though I expressed a doubt upon this point in *Bloxsome v. Williams*, I am satisfied, upon further consideration, that it would be a narrow construction of the act, and a construction contrary to its spirit, to give it such a restriction." The Court of Common Pleas in the case of *Smith v. Sparrow* (12 Moore, 366) held the same.

Agent.—The statute applies where a contract is entered into by the medium of an agent, who transacts the business in the course of his ordinary calling, just the same as if the principal had entered into it in the course of his ordinary calling. The contract is void as to the principal; and so it is though the objection is taken by the party at whose request it was entered into on the Sunday (*Smith v. Sparrow*, 4 Bing. 84; S. C. 12 Moore, 366).

Complete and binding contract.—The contract is rendered void only where the whole of its terms is fixed and concluded on the Sunday. The contract to be within the statute must be such as will give a right of action on its non-performance (see *Bloxsome v. Williams*, 3 B. and Cr. 232, and *Smith v. Sparrow*, 4 Bing. 84). In the former case, A., not knowing that B. was a horse dealer, made a verbal bargain with him on a Sunday for the purchase of a horse, and the price, which was above £10, was not specified, and the horse warranted, but it was not delivered till the following Tuesday, when the money was paid; it was held that there was no complete contract till the delivery of the horse, and consequently that the contract was not void under the statute of 29 Chas. 2, c. 7. The case of *Smith v. Sparrow*, shows that a distinct subsequent act will not of itself prove that the contract was imperfect on the Sunday. Mr. J. Gazelee there said: "The plaintiff's subsequent assent was an assent to the contract made on the Sunday, and there is no evidence to show that there was any subsequent contract. There is, therefore, no analogy between the circumstances of this case and those of *Saunderson v. Jackson* (2 Bos. and Pull. 238), where an inchoate contract was completed by a subsequent writing; but here the whole contract was completed on the Sunday." The act being illegal, of course the confirmation of it will, in general, be also illegal.

Fresh subsequent contract.—We must distinguish between a contract intended to be, and which in fact is perfect on a Sunday, and a case where there is a mere inception. The mere inception on a Sunday will not render the subsequently completed contract void; the contract made on the Sunday must be one that gives a right of action in order that it should be affected by the statute. See *Williams v. Paul*, 6 Bing. 653; S. C. 4 Moo. and Pay. 532, and the explanation thereof in *Simpson v. Nicholls*, 3 Mees. and W. 240; S. C. 6 Dowl. 355; 2 Jur. 82. The doctrine of these cases is that

if there be new and distinct terms of contract at a time subsequent to the Sunday (supposing there is a good consideration), this new contract will be regarded by itself, and will consequently be valid. But the mere subsequent assent by the buyer is not sufficient to effect this result. In the case of *Smith v. Sparrow*, Mr. J. Gazelee said: "It is unnecessary to enter into any nice distinctions, or to decide whether a contract would be binding if all the terms of it were agreed on a Sunday, and a writing containing them signed the first thing on Monday morning." C. J. Best thought that such a contract could not be supported.

Executed contract.—If the property passes by delivery to the person from whom the value is sought to be obtained, this will raise a contract for the price of the goods so passed. In *Simpson v. Nicholls*, and *Scarfe v. Morgan*, a distinction was taken between executed and executory contracts. In the latter case, Mr. B. Parke said: "Though in the case of an executory contract, the law will not assist a party to recover compensation for the violation of an agreement rendered illegal by statute, still if the contract be *executed*, so that a property in the goods, either general or special, has passed thereby, there the property must remain." In the former case, Mr. B. Parke, alluding to *Williams v. Paul* (6 Bing. 653), says: "In one point of view the case may perhaps be supported, namely, that though the contract is illegal, being made on a Sunday, the property in the goods passes, although no action can be maintained for them."

One party ignorant of other's calling.—Suppose that one of the parties was ignorant that the other party with whom he is contracting is acting within the ordinary course of his calling or business, will the contract be altogether void? To hold the contract void would be doing manifest injustice. If one only of the contracting parties violates the statute, is the statute sufficiently enforced by holding the contract void as to the guilty party only? In other words, does the statute merely preclude the guilty party from enforcing the contract? It has been held that where one of the parties did not know the business of the other party, and was, therefore, ignorant that such party was violating the act, he might sue on the contract, for it is not open to the offender to set up his own breach of the law as an answer to the claim of the innocent party. See *Bloxsome v. Williams*, 3 B. and Cres. 283; and *Fennell v. Ridler*, 5 Barn. and Cres. 406. In *Smith's Mercantile Law* (p. 474, 4th edit.) it is supposed that the Court of Common Pleas doubted this case, but this was not on the point we are now considering; it was on the distinction between a public and private breach of the statute. Mr. Smith says: "It has been said that a contract of sale is not void against a person ignorant that a vendor was exercising his ordinary

calling ; but this is questionable." It will be seen by the cases that there is no ground for this doubt. In *Fennell v. Ridler* it was held that a horse dealer cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday. In *Bloxsome v. Williams*, which was an action of assumpsit for breach of the warranty of a horse, the defendant alone was in the exercise of his ordinary calling, and it appeared that the plaintiff did not know what his calling was, so that, in fact, defendant was the only person who had violated the statute : the court held that it would be against justice to allow the defendant to take advantage of his own wrong, so as to defeat the rights of the plaintiff, who was innocent. And, for the like reason, in an action by the indorsee against the acceptor of a bill of exchange which was drawn on a Sunday, it was held that the plaintiff might recover, there being no evidence that it had been accepted on that day. But the court said that if it had been accepted on a Sunday, and such acceptance had been made in the ordinary calling of the defendant, and if the plaintiff was acquainted with this circumstance when he took the bill, he would be precluded from recovering on it, though the defendant would not be permitted to set up his own illegal act as a defence to an action at the suit of an innocent holder (*Begbi v. Levi*, 1 Crompt. and Jervis, 180).

Liberal construction.—The act has always received a liberal construction, its object being to turn away people's attention from secular affairs on the Sabbath (exp. *Middleton*, 3 Barn. and Cres. 164 ; see 5 B. and Cr. 409 ; 4 Bing. 88). But still, as observed by Mr. J. Bayley (7 Barn. and Cres. 599), though the act ought to be so construed as to advance the objects contemplated by the Legislature, this is not to be done so as to make every work or business done on the Lord's-day illegal.

Delivery and acceptance of goods on Sunday.—We may conclude this subject with a notice of a very recent case as to the effect of an acceptance on a Sunday of goods previously ordered by parol, with a view to satisfy the requirements of the statute of frauds. The point, as will be seen, was not actually decided. A. agreed to purchase of B. a carriage, then standing in the shop of B., A. at the same time desiring that certain alterations might be made in it. The alterations having been made, the carriage was, at A.'s request, placed in the back shop. On Saturday, the 14th of November, A. called at the shop and requested B. to hire a horse and man for him, and to send the carriage to his house on the following day, in order that he might take a drive in it, A. having previously intimated his intention to take the carriage out a few times in order that, as he was going to take it abroad, it might pass the Custom House as a second-hand carriage. The carriage was accordingly sent to and used by A. on the Sunday. A. paying for the hire of the horse and man. At

afterwards refused to take or pay for the carriage. Held; that there was a sufficient acceptance of the carriage by A. before Sunday, the 15th of November, within the 17th section of the 29 Car. 2, c. 3, to entitle the plaintiff to recover upon a count for goods bargained and sold. *Quere*, whether the statute 29 Car. 2, c. 7, avoids a previous parol contract for the sale of goods where the delivery took place on a Sunday? *Beaumont v. Brengeri*, 5 Com. Bench R. 301.

EASTER TERM EXAMINATION QUESTIONS.

COMMON LAW.

I. Are there any circumstances under which a feme covert can sue alone, and what are they? II. Can a landlord distrain the goods of lodgers for rent due from his own tenant? III. When a landlord distrains for rent, within what time must he proceed to sell the goods distrained? IV. What is the period limited for enforcing a simple contract debt? and what steps are requisite to prevent the operation of the statute of limitations? V. What are the consequences of joining too many plaintiffs in an action of contract? VI. When an action of contract is brought against one only of several partners, what step ought the defendant to take? VII. If a writ of summons cannot be served on a defendant, what steps should be taken to compel his appearance? VIII. What facts must be stated in the affidavit on which an application for a writ of *capias* to hold to bail is grounded? IX. If a plaintiff brings back the venue, when changed by the defendant, upon the usual undertaking to give material evidence within the county, and fails to do so, what will be the consequence at the trial? X. After what period of time is the necessity of proving the execution of a deed dispensed with? XI. When the attesting witness to a deed is dead, what is the proper mode of proving the execution of it? XII. What is the meaning of a judgment *non obstante veredicto*? and what effect has it on the action, and especially the costs? XIII. When a judgment has been recovered from a registered officer of a joint-stock company, can it be enforced against the individuals forming that company, and by what means? XIV. When a party gives a warrant of attorney, by whom must it be attested, and what must the attestation state? XV. What is the first proceeding in an action of ejectment? Upon whom must it be served, and where?

EQUITY.

I. What is the rule in equity as to time barring or not barring relief against a fraud? II. State the consequences of omitting the

prayer for general relief? III. Mention the principal cases in which a bill must be accompanied by an affidavit, and how is the omission of such an affidavit taken advantage of? IV. What periods after appearance are allowed to a defendant for putting in his defence? In what cases is further time allowed, and how is it obtained? V. When must a plea be accompanied by an answer? VI. State shortly the several steps for obtaining a full answer? VII. What matters interrogated to in the bill is a defendant protected from answering? VIII. What is the difference between an evasive and an insufficient answer, and how are they respectively treated? IX. State the different ways in which a plaintiff tacitly waives his right to except to an answer for insufficiency. X. An answer serves two distinct purposes; what are they? XI. What papers and documents is a defendant compellable to produce on motion for the plaintiff's inspection? XII. When is security for costs required from a plaintiff? XIII. What is the difference, in effect, between taking a bill *pro confesso* and filing a traversing note? and to what proceedings at law may they be compared respectively? XIV. Explain the purport and effect of setting down a cause on bill and answer; and with what proceedings at law does it correspond? XV. If a plaintiff changes his residence after filing the bill, and then amends, what is his duty with respect to such change, and what is the consequence of neglecting it?

BANKRUPTCY.

I. What are the three conditions required to constitute a bankrupt? II. Give shortly the general description of a trader within the meaning of the bankrupt laws, and state the principle which determines whether the person is such a trader, in respect of the extent of his trading. III. What must be the nature of the petitioning creditor's debt? IV. State shortly the several steps which must be taken for putting a trader in the Court of Bankruptcy. V. Before whom should the petitioning creditor's affidavit be sworn? and may the solicitor for the fiat administer the oath? and must the petitioning creditor attend personally on opening the fiat? VI. What means has a person of annulling a fiat which has been improperly issued against him? and within what time can he do so? VII. Specify generally the kind of debts which may be proved under a fiat. VIII. What is the rule with respect to contingent debts? IX. What is the rule with respect to debts for which the creditors hold securities? X. When must the bankrupt surrender? What is implied in such surrender? and what are the consequences of neglecting to surrender in due time? XI. Explain the purport, object, and effect of an "adjournment *sine die*" of the bankrupt's examination. XII. What is the effect of the certificate? and what

share have the Court of Bankruptcy, the commissioner, and the creditors, respectively, in granting, suspending, or withholding it? XIII. To what extent, and under what circumstances, may a trader assign his effects as a security for or in payment of an antecedent debt, without committing an act of bankruptcy? XIV. What acts of a joint stock company will be deemed acts of bankruptcy? XV. State the rights of the assignees as to property in the bankrupt's possession at the time of the fiat, but belonging to other persons.

CONVEYANCING.

I. What is the largest estate, or interest in land, that can be conveyed by one person to another? II. What are the present modes of conveyance for passing away freehold land? III. How is copyhold land usually conveyed, *i. e.* by what mode of assurance? IV. If land be conveyed to the use of A., and the heirs male of his body, what estate does he take? V. By what means can a tenant in tail convert his estate tail into an estate in fee? VI. If land should be conveyed to the use of A. and B., and their heirs, what would be the nature of the estate which they would take? VII. If it be required to pass land by deed to A., B., and C., as tenants in common in fee, what words should be used in the operative part of the deed to vest such an interest in them? VIII. State shortly such covenants on the part of a vendor of land as in his conveyance to a purchaser he is usually required to enter into. IX. In what manner should a testator execute his will to make it valid? X. If a person die intestate, without leaving father, wife, or child, but leaving a mother, a brother, and two children of a deceased brother, how would the surplus of the intestate's estate be distributable? XI. If an intestate die, leaving a deceased brother's daughter, and two grandchildren of a deceased sister, how would the surplus be distributable? XII. If a person is desirous of selling a leasehold estate, and is unable to produce the original lessor's title, what course should he pursue to obviate, as far as possible, any objection to be taken by a purchaser on that account? XIII. In case a lease of lands in Middlesex be not registered, will the registering an assignment of it cure that omission? XIV. Is a purchaser of an estate sold, subject to a trust for payment of debts *generally*, bound to see to the application of the purchase money? XV. Would a contract for the purchase of land be impeachable or not by a vendor, on the ground of considerable inadequacy of consideration, but not of fraud

CRIMINAL LAW.

I. What are the two principal divisions of crimes and offences? II. What is the effect of a conviction for an offence in either of the

divisions or estates on the real and personal property of the party convicted? III. What is homicide, and how many and what kinds of it are there? and give instances in each. IV. If a party is convicted of an offence which occasions a forfeiture of his property, and undergoes the punishment of transportation or imprisonment for the offence, is he enabled to have and retain property acquired subsequently to the expiration of the term of his punishment, notwithstanding the previous forfeiture? V. What is now the law with respect to amendments, where there is a variance between written or printed evidence and the recital of it in the indictment or information? VI. How can questions of law in criminal cases be submitted to the consideration of the judges? and has there been any, and what, recent alteration in the law on this subject? VII. What is an *ex officio* information, and by whom and where filed? and must it be submitted to a grand jury before it is filed? VIII. What is a criminal information, and how obtained, and where filed? IX. If a man be convicted of perjury, what effect has it upon him as a jurymen or witness? X. Where several persons have been indicted, and, at the close of the prosecutor's case, it appears that there is no evidence against one of them, how can such person be called as a witness for the others? XI. Is the counsel for a prosecution bound to call every witness named on the indictment? or how can they be called to enable the prisoner to cross-examine them? XII. Is the oath of the mother of an illegitimate child alone sufficient to charge a person as the putative father thereof? or does it require to be supported by any, and what, kind of confirmatory evidence? XIII. If a person admit himself to be the father of an illegitimate child, can the overseers of the poor of the parish in which it is born take a promissory note for payment of a sum of money for its maintenance, and maintain an action against him upon it in default of payment thereof? XIV. Has the court any, and what, power with regard to the allowance of the costs of a prosecution? XV. On an information for a misdemeanour, where the prosecutor does not proceed to trial according to his notice, is he liable to any, and what, costs of the party accused?

NEW COUNTY COURTS.

Replevin [ante, 123]—Bond to sheriff—Jurisdiction.—It has lately been decided that the court of the sheriff, as distinct from the new county court, has no jurisdiction to entertain an action or plaint of replevin of goods distrained, which must be entered in the new court

having jurisdiction in the district wherein the distress was taken. Also, and as a necessary consequence from the preceding, that a replevin bond conditioned for the obligor to appear at the next sheriff's court (that not being a court held under 9 & 10 Vict. c. 95), and then and there to prosecute his suit with effect, is insufficient (*Edmonds v. Challis*, 13 Jur. 389).

Charitable trusts jurisdiction in county courts.—A bill has been introduced into Parliament for giving jurisdiction to the new county courts over small charities. The 8th section of the bill transfers to the county courts the jurisdiction now exercised by the Court of Chancery over charities whose income does not exceed £30, subject, however, by the 9th section to a stay of proceedings in the matter of appointing a new trustee, if any existing trustee shall give notice of his wish to have the matter heard by a Master of the Court of Chancery; subject also by the 12th to an appeal to the Court of Chancery, if the judge of the county court shall think the case a fit one for appeal. The provision as to costs appears to be very unsatisfactory, and ought to be made more precise.

New judge.—Mr. Serjt. Herbert Jones has been appointed to succeed Mr. Starkie as judge of the county court for the Clerkenwell district. Mr. Jones was called to the bar in 1828, and took the coif in 1842; he is a member of the South Wales circuit.

Costs — Judgment by default and writ of inquiry.—A plaintiff obtaining a judgment by default in the superior courts, even though he executes a writ of inquiry, and less than £20 be recovered, will not be deprived of his costs, as such a case is not within the 9 & 10 Vict. c. 95, s. 129 (*Reed v. Shrubsale*, 38 L. Obs. 53).

Extended jurisdiction.—There can be little doubt but that the jurisdiction of the county courts will be extended by increasing the amount in respect of which they shall adjudicate, and by giving them an equitable jurisdiction. These will be important alterations and peculiarly acceptable to country practitioners, particularly if some reasonable scale of costs be promulgated at the same time. Without this any extended jurisdiction will be injurious. A writer in the *Jurist* (vol. xiii, pt. 2, p. 174), after some very sensible remarks as to giving the courts an equitable jurisdiction, says: "There is another point, to which we trust attention will be paid, and that is the retention for the public of the services of really educated and respectable legal practitioners. It is a question, whether the effect of the present county courts jurisdiction would not be more beneficial to the public, if for demands at least above £10 the scale of costs were such as to induce educated solicitors to practise in the county courts, or at least were not such as almost entirely to exclude them. The true principle has always appeared to us to be this: that either no agents at all should be employed, or that the properly educated and respect-

able practitioner alone should be employed. Hence, in certain cases, we should say for common law cases under £10, and in equity cases under £50, it should be compulsory on parties to conduct their own cases; they should not, in such cases, be allowed to appear by any person whatever. But in cases above the particular fixed minimum, the costs to be allowed in taxation should be such as to enable parties to avail themselves of the advice and assistance of professional men who have a professional reputation at stake. We trust, that, if the jurisdiction of the county courts be extended in amount at common law, and, in point of jurisdiction, to equity, this point will be kept in view. If it is not, the county courts will be less useful than they might be."

Recovery of possession of small tenements [*ante*, pp. 69, 122]—*Rent £50—Time for delivering possession—Previous judgment—Nullity.*—By s. 122 of the County Courts' Act, a judge may order possession of premises to be delivered to the landlord where the *rent* does not exceed £20, and no fine has been paid; but the warrant to the bailiff must order delivery to be made within a period not being less than seven nor more than ten days from the date of the warrant. In a late case it was decided that the judges of the county courts have jurisdiction in all cases, under sect. 122 of the 9 & 10 Vict. c. 95, whatever may be the value of the premises, if the rent does not exceed £50 per annum, and there is no fine. Where a plaint was levied under sect. 122, and judgment given for the plaintiff, but possession was not ordered to be given till six months after the order was made, which the landlord treated as a nullity, and again applied for a second order, when possession was ordered to be given within the time specified in that section, on application for a prohibition to restrain the plaintiff from further proceedings, on the ground that a prior judgment had been recovered and was unreversed: held, that the prior judgment was a nullity, which the plaintiff was entitled to treat as such, and that the second plaint was properly levied (in *re Fearon v. Norvall*, 13 Jur. 325). *Per Patteson, J.*: "A doubt arose in my mind, whether, upon the true construction of the 122nd section, it would apply at all where the tenant appeared. I have, however, looked carefully into the rules and forms framed in pursuance of the act, from which it would appear that the judges seemed to have considered it did apply. In conformity with this view, my brother Erle decided the case, in *re Fearon v. Norvall* (17 Law Journ., N. S., Q. B. 161; *ante*, p. 69). I must, therefore, abide by the ruling there laid down, viz., that the defendant's appearance does not oust the jurisdiction of the court as to the effect of the former judgment. It appears to have been the intention of the act that there should be an adjudication of the right, and an order for the defendant to deliver up possession forthwith, or in default a warrant

may issue, in order to obtain possession within not less than seven nor more than ten clear days. Here the order was for delivering possession on the 24th December, which order was beyond the jurisdiction of the judge. The landlord, perceiving this difficulty, levied another plaint; when an objection is taken in the nature of a plea of judgment recovered, which, no doubt, generally speaking, would be a valid answer. If a judgment is given in one of the superior courts, it matters not in such cases whether it is good or bad, as it can be reviewed by a writ of error; but in a case like the present there is no possible way of reversing the former judgment. I think, therefore, the landlord was at liberty to treat it as a nullity."

MISCELLANEA.

Pawnbroker—Interest—Usury.—In a case of *Fitch v. Rochford* (not yet reported), the Vice Chancellor of England held that a transaction between a borrower and a pawnbroker, where the sum lent exceeded £10, and the interest reserved was £15 per cent., was illegal, on the ground that the form and nature of the instruments constituting the agreement between the parties showed the transaction to be a *pawnbroker's* transaction. A writer in the *Jurist* impugns this decision. He says: By the 1st sect. of 2 & 3 Vict. c. 37, any person, pawnbroker or not pawnbroker, may agree for any amount of interest on any loan exceeding £10, secured upon any kind of personal security—of course, among others, upon any deposit of any chattel. The 3rd section prevents the repealing of the pawnbrokers' act. What it does, therefore, is this: it leaves it lawful for pawnbrokers to take £15 per cent., and no more, as prescribed by c. 39 and 40, Geo. 3, upon loans of £10, and it leaves subsisting the silence of the Pawnbrokers' act as to the interest which may be taken by a pawnbroker upon loans above £10, and it leaves him, therefore, at liberty to do what, at common law, or by the statute law, is left lawful by the 39 and 40 Geo. 3; that is, to take any amount of interest on any loan exceeding £10. We submit with great deference to the high authority of the learned judge who decided *Fitch v. Rochford*, that this is the true construction of the 39 and 40 Geo. 3, and 2 & 3 Vict., and that it is quite immaterial what be the form of the contract between the pawnbroker and pawnbroker, except in so far as it may be material, for the purpose of avoiding penalties, that the pawnbroker should comply with the formalities prescribed by the 6th and subsequent sections of the Pawnbrokers' Act." The above case of *Fitch v. Rochford* has since been reported, and the decision of the V. C. has been reversed. We shall notice the case under the head of "*Recent Leading Cases.*"

Warranty of quality and title on sale of goods and provisions.—In reference to the cases of *Morley v. Attenborough* (*ante*, p. 130—132) and of *Burnby v. Bollett* or *Rollitt* (*ante*, pp. 129, 130), the following observations have appeared in the *Irish Jurist* (vol. 1, part 2, p. 196): A contemporary legal journal (13 Eng. Jur. 141, part 2) observing on the case of *Morley v. Attenborough*, says:—That so far as the judgment of the Court proceeded on the supposed analogy between warranty of title and of quality, the analogy is deficient, as a shop-keeper does not warrant the quality of the goods sold by him, though he is now to be considered as warranting title. To these observations we cannot assent. To us the analogy appears extremely close, if not complete. No doubt, a shop-keeper does not, in every case, warrant the quality of goods sold by him, because they are capable of examination by the vendee; but so it is in the case of warranty of title; where it is in the power of the purchaser to ascertain, or the circumstances of the sale are such as to put him upon enquiry as to the state of the title, no implied warranty will arise, *Bayley v. Meril* (Cro. Jac. 386); *Dyer v. Hargrave* (10 Ves. 507). On the other hand, where the purchaser has no opportunity of examining the goods, merely ordering them from the shopkeeper, there is an implied warranty as to their fitness for the particular purpose they are required for, as in *Burnby v. Rollitt*, the Court holding that if the purchase had been from a professed dealer, and under the same circumstances which occurred with the defendant, in that case there would have been an implied warranty of the quality of the meat, at least its fitness for use (See *Browne v. Edginton*, 2 M. and Gr. 279; *Chaster v. Hopkins*, 4 M. and Wels. 399; *Jones v. Bright*, 5 Bing. 533). The conclusion arrived at by the same journal—that as no implied warranty of quality arose from the contract, when the purchaser has had full opportunity himself of examining the subject of the purchase, that consequently the maxim *caveat emptor* was inapplicable to the case of warranty of title of goods, where the purchaser has not the means of exercising his own judgment, is, we think, deficient in analogy, if the rule we conceive deducible from the authorities be the true one, viz: that in cases of warranty, whether of title or quality, if the purchaser have the means of ascertaining the true state of facts, he takes on himself the responsibility, and no warranty is created. If, on the contrary, the vendor has the sole means of knowledge, and the subject be purchased in the usual place of sale, under ordinary circumstances, and there is nothing in the sale such as would put a cautious purchaser on inquiry, a warranty of title will be implied. The decision of the Court on the particular case before them, is in direct accordance with the view we have taken. The sale being notoriously of unredeemed pledges, the purchaser, in the view of the law, must have

been aware that he could have no better title than his vendor had, which, necessarily was one qualified by the laws respecting pawn-brokers.

Trinity Term Examination.—The Examination for Trinity Term 1849, has been fixed for Tuesday the 5th of June.

Vice-Chancellor of Duchy of Lancaster.—This office, which had become vacant by the death of Mr. Horace Twiss, has been conferred on Mr. W. Page Wood, of the equity bar, and M. P. for Oxford.

Repeal of certificate duty.—The Incorporated Law Society have applied to Lord Robert Grosvenor to take charge of the bill for the repeal of the certificate duty on attorneys, and to fix an early day for bringing in the measure. It appears that 133 petitions are ready to be employed when the motion comes on (38 L. Obs. 50).

Law societies.—The union of the great body of attorneys and solicitors throughout the kingdom is evidently the first great step to be attained. If the majority of them were enrolled as members in some of the various law societies in town and country, there is scarcely any right and just object which might not be speedily effected. By their own personal influence, aided by the press, the grievances under which the profession labours, would soon be redressed (38 L. Obs. 27).

NOTES OF RECENT LEADING CASES.

EQUITY.

EXECUTORS.—*Taking beneficially where trusts fail—Next of kin.*—It is laid down by Blackstone (2 Com. 515) in general terms, that when all the debts and legacies are paid by an executor, the surplus must be paid to the residuary legatee, if any; if none, the surplus would go to the executor (except it appeared to have been the testator's intention that it should not, in which case the next of kin would be entitled). It is true that by the 11 Geo. 4 and 1 Will. 4, c. 40, it is provided that unless it shall appear upon the will that the executor was intended to have the residue, he shall be deemed by a court of equity to be a trustee for the next of kin; but still questions arise independently of this statute, for it only applies to persons dying after the 1st of September, 1830. And s. 2 provides that nothing therein contained shall affect or prejudice any right to which any executor, if the act had not been passed, would have been entitled, in cases where there is not any person who would be entitled to the testator's

estate under the statute of distributions, in respect of any residue not expressly disposed of (see 9 Jarm. Convey. by Sweet and Bissett, 253, 254). And the question may still arise whether the bequest of a residue to an executor carries the beneficial interest. With such a bequest the act does not interfere, leaving it to be decided according to ordinary rules of construction (*Ibid.*). A case has recently been reported in which the law prior to the statute was fully considered, and it was satisfactorily settled that where there is a distinct nomination of an executor after a gift of property to the person named as executor, the executor does not take the residue after performing the trusts, in exclusion of the next of kin. In the case referred to it appeared that a testator bequeathed all his property to "A., his executors, administrators, or assigns, to and for the several uses, intents, and purposes following." Then followed certain trusts, which did not exhaust the entire property; and at the end of the will came the following clause: "Lastly, I nominate, constitute, and appoint the aforesaid A. executor of this my last will and testament." The testator died before the passing of the 11 Geo. 4 and 1 Will. 4, c. 40. Held, reversing the decision of the Vice-Chancellor of England, that A. was a trustee of the residue for the next of kin of the testator. The decision of Sir William Grant in *Dawson v. Clark* (15 Ves. 409) overruled. *Mapp v. Elcock* (13 Jur. 290). Per Lord Chancellor: "It is contended that if the property, instead of being left to an executor in trust, or to a third person in trust, be left to the executors, not as such, but in their own names, upon trusts which fail or do not exhaust the property, those trustees, in their character of executors, are entitled to the residue as incident to their office. I cannot see any principle for this distinction. If the office and private character of the person appointed executor are to be considered as distinct, it would seem to be immaterial whether the trustees are the same persons who are named executors or strangers; and if the two characters are to be considered as united, the case of a gift to an executor in trust is complete. It seems to be admitted that *Robinson v. Taylor* (2 Bro. C. C. 589) negatived the supposition that a gift in trust to the "executors hereinafter named" was so different from a gift to a person by name, who is afterwards appointed executor, as to operate as a transfer of the residue from the next of kin to the executor. It would be to be regretted if the title to property was to depend on such unsubstantial distinctions. The difference is merely in the mode of expression for the purpose of pointing at the same individual; but, unless this distinction can be maintained, it would seem that *Robinson v. Taylor* ought to have governed the decision in *Dawson v. Clark*. Sir William Grant, however, in that case, mentioned the distinction, and in effect held that, although a gift in trust to his executor, A. B., would entitle the next of kin, a gift in

trust to A. B., whom he afterwards appointed his executor, would entitle the executor to the residue. No case appears to have been referred to, and no earlier case has been produced sanctioning such a distinction. When the case of *Dawson v. Clark* came before Lord Eldon on appeal (reported in 18 Ves. 247), he decided it upon a point that does not arise in the present case; but he most distinctly expressed his opinion that the distinction relied upon between that case and *Robinson v. Taylor* could not be maintained, and showed clearly he would not have affirmed the decree on the ground on which Sir William Grant decided it. It is true that in *Southouse v. Bahe* (2 Ves. 396) Sir William Grant seemed disposed to think those grounds satisfactory. No one can be more inclined than I am to pay every deference to the opinion and judgment of that most eminent judge, but I cannot adopt the grounds on which he acted in that case. The view taken by Lord Eldon appears to me to be perfectly correct, and to be founded on the true principles which have regulated the decisions on this subject."

CONVERSION.—*Real estate ordered to be sold—To form part of her real and personal estate—Heir and next of kin—Real and personal estate—*[*Flint v. Warren*, 16 Sim. 124; S. C. 12 Jur. 810].—The mere circumstance that realty is directed to be converted into personalty will not deprive the heir of his rights—to do that there must be a disposition; for nothing is taken away from the heir except it is disposed of to some one else. Thus, Lord Brougham in *Amphlett v. Parke* (2 Russ. and Myl. 227), says: "The general principle appears to be that the heir must be effectually displaced, that he is not to be displaced by inference or implication, but that there must appear a clear, substantive, and undeniable intent on the part of the deviser or testator to exclude him; otherwise, neither can the next of kin, as being entitled under the statute of distributions, take from the executor, nor can residuary legatees, whether they be the executors or specific legatees of the residue, take more than that which is in its nature residue, to the prejudice of the claims of the heir at law. And the executors will hold as a resulting trust, whatever would have gone to the heir at law if he had not been excluded, the proof lying on the residuary legatee to displace the heir, and substitute himself. * * The inquiry always is,—has the heir at law on each individual case been sufficiently removed to let in the residuary legatee to that, which, whether it continues to be land, or whether it has been converted for a specific purpose into money, is only money till the purpose is answered or fails, and which, in the latter case, as a resulting trust, will then revert to the heir at law?" In the case of *Flint v. Warren*, it appeared that a testatrix by her will, after expressing an intention to dispose of all her real and personal estate as thereafter mentioned, gave certain legacies, and

appointed A. and B. her executors, and gave to them and their heirs all lawful powers and authorities to conduct and manage her freehold estates so as that the same might, at their discretion, be sold and converted into money, and she directed that the net money should form part of her real and personal estate; and for those and every other purpose connected with her property, whether real or personal, she invested A. and B., and the survivor of them, and his heirs, executors, and administrators, with her full authority; and she directed that any undisposed-of surplus of moneys should be paid as she should by any future writing or will direct; she did not, however, make any future writing or will. After her death, A. and B. sold her real estates. Her personal estate was sufficient to pay her debts and legacies. It was held that her heirs, and not her next of kin, was entitled to the moneys produced by the sale (*Frost v. Warren, supra*). *Per V. C. of England*: "There are no words of gift to take the proceeds of sale of real estate away from the heir. It is a settled rule that nothing takes from the heir except a gift. There is no declaration of intention, except that it shall be considered as part of my personal estate, and no gift at all. I am not at liberty to say that the money does not belong to the heir. I was particularly struck with the judgment of Lord Brougham, in *Amphlett v. Perke*, (2 Russ. and Myl. 221): that case was much considered, and there was no appeal, though the parties are stated to have been dissatisfied. The true construction in this case is, that as the fund is not given away it belongs to the heir."

EXECUTORS.—*Duty of executors in taking care of testator's property—Liability for losses—Wilful default—Executors carrying on trade*—[*Kirkman v. Booth*, 18 Law Journ., N. S., Chanc. 25].—This case, as to the duties and liabilities of executors, particularly with respect to their carrying on a trade, the right of the cestui que trusts to a full account and inquiry as to the property and the liabilities of the personal representatives of the executors, well deserves mention, though its details are somewhat complicated. A testator, who was carrying on the business of a brewer, in partnership with two other persons, made his will in 1802, and thereby gave all his real and personal estate to his son J. K. and three other persons, upon trust, to allow his wife, during her life, to have the use of his furniture, plate, &c., of which an inventory was to be taken; and then, upon trust, either out of the income, or by sale or mortgage, or other disposition of his real or personal estate, to raise, in the first place, £8,000 for his younger children, and then to pay his wife an annuity of £365 during her life, and subject thereto, the testator directed his trustees to permit his son, J. K., to take the annual produce and profits of his real and personal estate during his life, and after his decease it was given to the children of J. K. The

testator then directed that in case his son should punctually pay the sum of £8,000 as it came due, and also the annuity of £365, the trustees should permit him during his life to receive the annual produce and income of the testator's real and personal estate for his own use. The testator also appointed his four trustees and his wife his executors and executrix. The testator afterwards purchased the shares of his partners, and carried on the business in partnership with his son. He died on the 14th of September, 1803. All the executors proved the will. J. K., the son and last surviving executor, died in the year 1831, having become a bankrupt in the year 1816, up to which time he carried on the business. The executors took no precaution to preserve the brewery property for the benefit of J. K.; and from the time of the bankruptcy of J. K., the brewery continued in possession of his assignees until 1824, when the equity of redemption therein was released to the mortgagee. In 1815, J. K. made an absolute assignment of certain leasehold houses in consideration of £450. No inventory had ever been taken of the furniture, &c., bequeathed to the widow for her life, who died in the year 1824, and no part thereof, or the proceeds thereof, was forthcoming. A debt of £2,990 due from the testator's estate to one of his late partners had been converted into a debt of £5,000 three per cent. consols. A part of the testator's personal estate at his death consisted of canal shares, some of which the executors neglected to realise until the year 1810, and one of the executors had received several hundred pounds by way of commission for business done by him on account of the testator's estate. Held, on bill filed in 1845, by three of the children of J. K., deceased, against the personal representatives of the deceased executors, that the plaintiffs were entitled to an account and inquiry as to all the property which the testator possessed at his death, and what had become thereof, and what steps the executors took for the purpose of recovering or receiving any part of the property which, without their wilful default, they might have received. Held, also, that as to the furniture and converted debt, the Master ought to have liberty to state special circumstances, and that there ought to be a direction that if the Master could not satisfactorily take the inquiry, he should be at liberty to state the circumstances that created the difficulty. To authorise executors to carry on, or to permit to be carried on, a trade, the property of a testator, which they hold in trust, there ought to be the most distinct and positive authority and direction given by the will for that purpose (*Kirkman v. Booth*, 18 Law J., N. S., Chanc. 25).

COMMON LAW.

PARTIES TO ACTION.—*Separate action where joint covenantees.*—*Disclaimer by one covenantor.*— [*Witherell v. Langston*, 1 Exch.

Rep. 534; S. C. 17 Law Journ., N. S., Exch. 326.]—There have of late years been many decisions as to the parties to sue where there are several covenantees (see *Hopkinson v. Lee*, 14 Law Journ., N. S.; Q. B. 101; *Bradburne v. Botfield*, 14 Mees. and W. 564; *Folsy v. Addenbrooke*, 4 Q. B. Rep. 197; *Wooton v. Steffioni*, 12 Mees. and W. 134). Some of these cases turned upon the interest of the covenantees. But in the case we are about to notice no such point arose. A., by indenture, covenanted with B. and C., their executors, administrators, and assigns, to pay a sum of money to be held by them on certain trusts. C. did not assent to or execute the deed, and subsequently by an indenture, to which neither A. nor B. were parties, disclaimed all the trusts of the first indenture. It was held (in the Exchequer Chamber) that B. could not sue A. alone upon the covenant during the lifetime of C. (*Wetherell v. Langston*, *supra*). The exact point had never before been determined. In *Petrie v. Bary* (3 Barn. and Cres. 353) the action was brought by one of three covenantees alone, the declaration alleging that the others did not seal the deed. But as it was clear such parties might sue together with those who had sealed, it was held they were bound to do so, and that the action could not be maintained without them. But in that case Abbott, C. J., expressly qualified his judgment, saying "We are not called upon to consider the effect of an express disclaimer, renunciation, or refusal by the other covenantees, for nothing of that kind is alleged." In the principal case the plaintiff's main contention was as follows: Many authorities showed that by a disclaimer or declaration of non-assent on the part of one trustee an estate will vest wholly in the other. So also by the assent of one covenantor, the result would be to vest the contract only in the other. Further, as the original nature of a joint covenant did not prevent one suing alone, in case he survived another, so also it ought not to have that operation in the present instance. The court (in error) were, however, of opinion that it followed as a consequence, from two well-established principles of law, that no disclaimer could have the effect of enabling one joint covenantee to sue alone. Those rules of law were—first, in order to make a binding contract, the assent of both parties was necessary; next, a right to sue upon a contract was not assignable by the act of the party who had such right. In applying the first principle it is to be observed, the meaning of the words of the covenant in the present case was that the defendant would pay the two covenantees; but that meaning was the same, whether they accepted the covenant or not; and the acceptance and the refusal of the other did not alter the sense, so as to convert it into a covenant to one only. There had, therefore, been no original assent by the covenantee to any but a joint contract, which did not in itself embrace two separate contracts. Secondly, the disclaimer, which was no doubt intended to have the

effect of vesting the entire right of action in the plaintiff in the joint contract, could not have that effect, because the right of suing was not by law assignable by act of the party. In the case of survivorship the right of action was transferred by operation of law, not by act of the party. Then, too, the analogy sought to be drawn from cases where, upon a devise or conveyance to two, the disclaimer of one has been held to vest the estate wholly in the other, was inapplicable here, because there the subject dealt with was not a mere personal contract but an interest in land, and joint covenantees and obligees on personal contracts differed materially from joint tenants of estates in land in respect of their power of dealing with their rights. Such were the grounds upon which it was held the defendant had incurred no liability of being sued by the plaintiff alone, but whether his liability to be sued in a joint action was put an end to by the disclaimer of one covenantor was an independent point, which, though much argued, it became unnecessary to decide, and as to which the court withheld any intimation of opinion."

CONVEYANCING.

ANNUITY.—*Charging fee simple in possession—Inrolment not necessary—Power to appoint—Conveyance to uses to bar dower.*—[*Doe Dem. Butler v. Kensington*, 8 Q. B. Rep. 429.]—We have before (pp. 80, 81) noticed a case as to the contents of a memorial of an annuity, and now we have to call attention to an instance in which a memorial of an annuity is not requisite. By s. 10 of 53 Geo. 3, c. 141 (requiring inrolment), the act is not to extend to Scotland or Ireland, nor to any annuity or rent-charge given by will or by marriage settlement, or for the advancement of a child, nor to any annuity or rent charge secured upon freehold or copyhold, or customary lands in Great Britain or Ireland, or in any of his Majesty's possessions beyond the seas, of equal or greater annual value than the said annuity, over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantees had notice at the time of the grant, whereof the grantor is seized in fee simple or fee tail in possession, or the fee simple whereof in possession the grantor is enabled to charge at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity, nor to any voluntary annuity or rent-charge granted without regard to pecuniary considerations or money's worth, nor to any annuity or rent-charge granted by any body corporate, or under any authority or trust created by act of Parliament." On a somewhat similar clause in the repealed act of 17 Geo. 3, c. 26, s. 8, Lord Kenyon, in *Halsey v. Hales* (7 Term Rep. 196), said: "I think the object of the legislature was to prevent persons, who had

so marketable estates, making improvident bargains in granting annuities; but they thought that a person who could bring a real security to market was not subject to such impositions, and therefore they provided by the last clause that the act should not extend to any annuity secured by lands of equal or greater annual value whereof the grantor is seised in fee simple, or fee tail. Now, what estate had the grantors of this annuity? They had the power over the fee simple, and it seems as if Lord Thurlow thought in the case cited (*Shrapnel v. Vernon*, 2 Bro. C. C. 268), that such a case came within the exception in the act. The grantors had the control over the estate; they went to market with a good title." In a late case, the above section of the 53 Geo. 3, c. 14, so far as regards a party's being able to charge the fee simple in possession, was considered. It appeared that lands were conveyed to such uses as K. should appoint; and in default of and until appointment, to K., and his assigns for K.'s life; and from and after the determination of that estate in K.'s lifetime, to a trustee for K. and his assigns, and to bar dower; and from and after K.'s decease, to K.'s heirs and assigns. Held, that during K.'s life estate, and before such appointment, K. was a party enabled to charge the fee simple in possession with an annuity within the meaning of statute 53 Geo. 3, c. 141, s. 10, and, therefore, the annuity (being of the value required by that clause) did not need enrolment under sect. 2 (*Doe d. Butler v. Kensington*, 8 Q. B. 429). Lord Denman said: "The lands on which the annuity was secured were freeholds, and of greater annual value than the annuity, beyond any other annuity or the interest of any other principal sum charged thereon. * * The property was conveyed to such uses as Lord Kensington should appoint by deed or will; and, in default of, or until such appointment, to the use of himself for life; remainder to a trustee for his life, in trust for himself and to bar dower; remainder to his heirs and assigns. The tenth sect. of 53 Geo. 3, c. 141, corresponds to the eighth sect. of 17 Geo. 3, c. 26, containing the same grounds of exception and more; it is to be construed in the same spirit, and what the spirit ought to be is laid down by Lord Kenyon, in *Halsey v. Hales* (*supra*). Within the rule there laid down, we are of opinion that Lord Kensington had power to charge the fee in possession."

COPYHOLDS.—*Surrender without admission—Husband and wife—Voluntary conveyance—Defective execution of a power*—[*Sowerby v. Gutteridge*, 18 Law Journ., N. S., Chanc. 9].—It is a general rule of courts of equity not to relieve against the omission of requisites in an instrument which is voluntary and not founded on valuable consideration. In other words, an imperfect voluntary instrument cannot be enforced. This has lately been decided in the case of a surrender of copyholds where there was no admission. A

woman seized of a copyhold executed a surrender jointly with her husband to such uses as her husband should appoint, and in default of appointment to him in fee, but no admittance was entered under the surrender. The husband then executed a conveyance of the copyholds to a purchaser, but still no admittance was entered. The plaintiff, who claimed under the purchaser, filed a bill to restrain an action of ejectment by the copyhold heir of the wife, and to compel a surrender to complete his title. It was held that the husband of the copyholder had no power to make perfect that title which he as a volunteer and without consideration took imperfectly, and no person claiming under him could ask that his defective title should be made complete; and the bill was dismissed with costs (*Sowerby v. Gutteridge*, 18 Law Journ., N. S., Chanc. 9). It will be observed that there was a purchase for value, and undoubtedly as against the husband's heir the purchaser would have been entitled to relief, but here he was seeking relief against the wife's heir, against whom the surrender as being an imperfect instrument was invalid. In other words, if the purchaser had claimed under her he might have had relief as a purchaser for value. The V. C. said: "Certain cases were cited in which the court, where there has been a power to appoint, has relieved against defective execution, when it was for valuable consideration. No doubt that is the law of the court. * * It appears to me that this case has no resemblance to the case of a power well created but imperfectly executed; here there was no attempt on the part of the husband and wife to vest the copyhold fee in the husband, but merely a voluntary instrument, and left imperfect because there was no admittance, and the husband had no power to make perfect that title which he, as a volunteer, took imperfectly." The L. C., on appeal, said: "This is perfectly voluntary, no consideration moving to the surrenderor at all: a transaction totally imperfect, incapable of conferring any legal title at all, and a court of equity is called upon and asked by the interposition of equity to compel the performance of a voluntary transaction of that sort. It was not contended at the bar that could be so. The whole case was put upon the mistaken notion that the case was against the heir of the husband, not against the heir of the wife. It is admitted that if you want an equity against the heir of the wife you must show some consideration. Being a deed purely voluntary, the court will take the view the Vice-Chancellor took."

DEVISE.—*Mortgage*—Words sufficient to pass legal estate in mortgaged property.—[*Dorcus v. Doherty*, 1 Ir. Jur. 220.]—It is laid down in 1 Jarman on Conveyancing by Sweet (v. 9, pp. 452, 785), that "it may be considered as settled that the legal estate in a mortgage in fee will pass under a gift of securities for money, at

least if the word 'heirs' occurs in the limitation of the legatee's interest," citing *Exp. Barber*, 5 Sim. 451; and *Mayther v. Thomas*, 6 Sim. 115; S. C. 3 Moo. and Sc. 684. In a late Irish case, which we are about to mention, it was suggested that as the new Wills Act makes the word "heirs" unnecessary, no implication can now be derived either from the presence or absence of that word in the devise. The case was this: A testatrix, who died possessed of a mortgage in freehold lands, after reciting that she was possessed of several sums of money lent and advanced to several persons, and charged upon freehold and other lands, gave and devised the same unto S. D., and G. H. O., upon the several trusts therein mentioned, and after giving several pecuniary and specific legacies, proceeded thus: "I leave all the rest, residue, and remainder of my property, of what nature or kind soever, I may die possessed of, to the said G. H. O., in trust for the children of Wm. O." Held, that the legal estate in these mortgaged premises passed to S. D. and G. H. O. (*Dorcus v. Doherty*, 1 Irish Jur. 220.) *Per Pigot, C. B.*: "The court should endeavour to construe the will with reference to what was present to the mind of the testatrix at the time she made it. It was passing in her mind that she had some freehold estates, as may be inferred from this that she couples the statement of the money itself with that of the land on which it was charged. Looking at the whole will, and having reference to the authorities, I think it may be reasonably intended, that she devised as well her estates in the mortgaged premises as the mortgage itself."

INSURANCE.—*Covenant to insure—Performing—Delay in insuring.*—[*Doe dem. Darlington v. Ulph*, 13 Jurist, 276.]—The following case shows the necessity of strict and early performance of covenants in leases. The defendant had occupied premises under an agreement for three years, expiring at Michaelmas, 1845, by which it was agreed that D. should grant a lease to him at the expiration of that time, subject to the covenants in the ground lease, including a covenant to insure the premises at all times after the date of the lease, and to keep them insured, to the satisfaction of the lessor and the ground landlord, with a power of re-entry for breach of covenant. At the expiration of the agreement, disputes arose between the parties, and defendant filed a bill in chancery for a specific performance. On the 12th of January, 1847, in pursuance of a decree, D. granted a lease according to the agreement, *ante* dated Sept. 29, 1845. Defendant did not effect an insurance until the 18th of February. In ejectment to recover the premises, on the ground of forfeiture, it was held that the defendant had not insured within a reasonable time from the execution of the lease. And *semble*, by *Wightman J.*, defendant was bound to have had the premises insured

at the time of the execution of the lease (*Doc dani. Derlington v. Upl.*, 13 Jur. 276).

LEASES.—*Demise of two houses with right of entry—Form of stating re-entry—Contract for sale—Indemnity—Recovering back deposit.*—[*Blake v. Phinn*, 3 Com. B. Rep. 976.]—We have before (p. 1—5) spoken of the necessity for exercising care in the framing the covenants and conditions in leases, and the case just cited is a good example in point. Before mentioning it, we may observe that it is laid down in Sugden's *Vend. and Purch* (p. 168, vol. 3), "Where the estate agreed to be leased was comprised with others in an original lease, under which the lessor had a right to re-enter for breach of covenants; so that the under lessee might be evicted without any breach on his part, it was held by Sir J. Leach, V. C. (*Feldes v. Hooker*, 3 Madd. R. 193), that he was not bound to accept the title 'with an indemnity.'" In the case we before alluded to, A. paid a deposit upon a contract for the purchase of the lease, &c., of a public-house. It being afterwards discovered that the house was comprised with another in an original lease, under which the lessor had a right to re-enter for a breach of covenants in respect of either house; it was held that A. was not bound to accept the title with an indemnity, but might recover back the deposit, with the expenses incurred in investigating the title (*Blake v. Phinn*, 3 C. B. 976; also in 16 Law Journ., N. S., C. P. 159).

LEASES.—*Liability of assignee—Covenant of indemnity.—Estate: owner's liability.*—[*Collins v. Crouch*, 13 Jur. 361.]—On a lease assigning over his lease he usually takes a covenant to indemnify him against the covenants in the original lease, which, indeed, is very necessary as to express covenants (see *Woolveridge v. Steward*, 1 Cr. and Mees. 644; *Harley v. King*, 2 Cr. Mees. and Rosc. 18). The benefit of this covenant, however, in the case of the death of the assignee would appear from the following case not to be so extensive as hitherto supposed. In the case alluded to the declaration by a lessee against the executor of the assignee, upon a covenant to indemnify the lessee against breaches of covenant in the lease, alleged non-payment of rent, land-tax, and rates. It appeared that before the breach of covenant defendant had assigned, and had applied the money received therefor to the payment of simple contract debts. It was held that the defendant was not liable to the action (*Collins v. Crouch, Executor, &c.*, 13 Jur. 361). *Per Patteson, J.*: "This is not an action by a person entitled to rent as rent, but by the representative of an original lessee against the representative of the assignee of the lease, upon a covenant to indemnify the lessee against breaches of covenant by the assignee, not upon a covenant to pay rent; and it appeared that before the covenant in question was broken, the house had been disposed of by the defendant in payment of simple

contract debts; and though the declaration alleged breaches of covenant before the death of the defendant's testator, those were not proved. * * Here the executor had parted with the lease, as, according to the case of *Read v. Blunt* (5 Sim. 567), before the Vice-Chancellor, he is entitled to do, the day before a breach of covenant occurs. There is no authority for saying that the executor is bound to keep in his hands assets to answer for contingent breaches of covenant, even if this had been a covenant for payment of rent; still less in the case of a covenant to indemnify." And Mr. J. Erie also stated that the covenant was merely a covenant to indemnify and not a covenant to pay rent, and therefore as the defendant had assigned before breach and applied the assets he could not be liable; an unbroken covenant standing upon the same ground as a simple contract debt.

MORTGAGE.—*Creation of tenancy between mortgagee and mortgagor—Distraint for rent.*—[*West v. Fritch*, 18 Law Journ., N. S., Exch. 50.]—A mortgage deed, executed by the mortgagor only, contained, in addition to the usual clauses, the following: that "for better securing the interest, the mortgagor does hereby attorn and become tenant of the premises to the mortgagee at the yearly rent of £40, payable half-yearly, so long as the principal sum shall remain secured." The mortgagor having continued in possession of the premises, and having made several of these half-yearly payments, which, however, were described in the receipts given by the mortgagee as being "for interest." Held, that the relationship of landlord and tenant existed between the parties, and that the former had the right to distrain for the amount of a half-year's rent. *West v. Fritch*, 18 Law Journ., N. S., Exch. 50. *Per Parke, B.*: "We all think that the subsequent occupation connected with the covenant in the deed, constituted, as between the mortgagee and mortgagors, the relationship of landlord and tenant upon the terms of that covenant. That being so, the defendants had a right to distrain for the rent in arrear." See *Doe dem. Garrod v. Olley*, 12 Adol. and Ellis, 481; S. C. 9 Law Journ., N. S., Q. B. 379. It should be noticed that in the above case of *West v. Fritch*, it was said by Mr. B. Parke, and conceded by plaintiff's counsel, that the deed not having been executed by the mortgagee it could not operate as a lease—that is, not so as to enable the mortgagee to maintain covenant for the rent, but that he might distrain.

POWER.—*Execution of, by will made before the power*—1 Vict. c. 26, ss. 24 and 27.—[*Stillman v. Weedon*, 16 Sim. 26; S. C. 18 Law Journ., N. S., Chanc. 46.]—By s. 24 of 7 Will. 4 and 1 Vict. c. 26, a will is to be construed to speak and take effect as if executed immediately before the death of the testator, unless a contrary intention appears. By s. 27, a general gift in a will is to include estates

over which the testator has a general power of appointment, and such devise is to operate as an execution of such power, unless a contrary intention shall appear by the will. This extends to both real and personal property (see *Frankcombe v. Hayward*, 9 Jur. 344; *Pidgeley v. Pidgeley*, 1 Coll. 255). In a late case, A., being entitled to a share of a testator's residuary estate, bequeathed *all the effects due to him from the estate* to his nine children. The estate was then unadministered, but it was afterwards administered, and certain debts due to it were allotted to A. as his share of the residue; after which he settled the debts in trust for himself for life, remainder in trust for his sons and daughters, or any of them, or any of their children, as he from time to time, by deed or writing, to be by him duly executed and attested, or by his will should appoint. It was held that under the combined operation of the 24 and 27 sects. of the 7 Will. 4 and 1 Vict. c. 26, the will, though made before the power was created, was a good execution of it (*Stillman v. Weedon*, *supra*). The V. C. of England, after referring to sects. 24 and 27, said: "The words in s. 27 are, 'which he may have power;' and my opinion is that those words must be taken in connection with the former section, which prescribes the time when the will is to speak; and it is there expressly declared that the will shall speak from the death of the testator. Therefore, the only possible question is whether, the testator having, as on the 1st of January, 1848, used the expression: 'all the effects due to me from the estate of H.,' these words could have been, before the 1 Vict. c. 26, considered as an execution of the power in the deed, provided the will had been executed after the deed. And it appears to me that, although those sums were not, strictly speaking, due, yet no one can read the will without seeing that that expression describes the very sums which were made the subject of the deed of settlement." The reporter (Mr. Simons) seems to question the construction put by the V. C. on sect. 27, that the power intended in the statute was not a general power. And certainly Mr. Hayes (1 Convey. 392, 5th ed.) favours this doubt.

WILL.—*Signature at foot or end.*—[*Smee v. Bryer*, 13 Jurist, 289.]—By sect. 9 of 7 Will. 4, and Vict. c. 26 (the New Wills' Act), every will is to be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction. There have been many decisions as to this provision, in the last of which, it was held that the words "at the foot or end thereof," in the above section, are to be construed strictly, and therefore where a will terminated within an inch of the bottom of the third page, but the signature was on the fourth page, it was held that the will was invalid, although the testatrix, at the time of the execution, explained to the witnesses why she so signed (*Smee v. Bryer*, 13 Jur. 289).

JOINT STOCK COMPANIES WINDING-UP ACT (1848).

We have before given a short analysis of this act (pp. 63—65), and intend to notice the cases in our "Abridgment of Practice Cases," but we have thought it would be useful to give here a connected view of some of the principal decisions on the act.

The first question is what companies are within the act? and this has been discussed in several cases before his Honour the Vice-Chancellor Knight Bruce. In the *Herne Bay Pier Company's case* (18 Law Journ., N. S., Chanc. 71; S. C. 12 Jur. 1064), the company was formed for the purpose of making a pier or jetty for landing goods and passengers. It had power to make landing places, quays, &c.; to erect toll gates, &c.; and to take tolls. It did not appear that it had or contemplated any other business than that of affording landing accommodation for goods and passengers from vessels, and taking tolls therefrom. The court thought it not clear that the company was within the meaning of the act; and that the jurisdiction ought not to be exercised except in reference to companies clearly and beyond all doubt within the meaning of the act. The next case is that of the *Agricultural Cattle Insurance Company* (13 Jur. 75). In that case the company was formed for the purpose of insuring against the losses arising by mortality among all kinds and descriptions of animals. The court held, as in the case first referred to, that the act was not to be applied except in cases which are clearly within its scope, and free from difficulty; and the petition was dismissed. These cases seem to call for no observation. Unquestionably, taking tolls for the landing of passengers or the like, or taking premiums for insuring against any contingency, has never been considered a strictly commercial or trading occupation, although it may be a profitable business; and it would require a considerable stretch of imagination to fix upon companies of either of the kinds referred to in the above-mentioned cases the character of companies formed for commercial or trading purposes. The next case that was decided is the *London and Manchester Direct Independent Railway Company's case* (13 Jur. 182). In that, the company was an uncompleted railway company—that is, a company formed for constructing and working a railway, but not carried beyond the formation of the company, and the allotment of shares, &c.; in fact, not carried to the point of obtaining, nor even applying for, the sanction of the Legislature. The court declined to apply the act of Parliament to such an association, intimating again that the court was only to put the law in force in a case to which

the Legislature had plainly and distinctly said that it should apply. On appeal this decision has been over-ruled by the Lord Chancellor, who decided that such a company came within the operation of the act (13 Jur. 395). His lordship said: "Here is an association formed for the purpose of making a railway, of manufacturing engines, &c., for the purpose of deriving profit one way or another, either by using them for the purpose of carrying goods and passengers for a profit, or for the purpose of letting them to others for that purpose; but in either case it is a speculation, having profit for its object. * * I have no doubt whatever that the manufacture of a railway, for the purposes I have mentioned, is a commercial speculation within the terms of the 7 & 8 Vict. c. 111." With all deference to his lordship, it appears to us that his usual perspicacity is not visible in his judgment, and we think it not improbable that the decision will be reversed on the appeal which is now pending in the Lords.

It has been decided that a mining company, formed on the "*cost-book*" principle *before* the passing of the act, is not within its operation. The construction of the statute is, that the second clause is confined in its operation by the first, and merely adds to the description of the companies which are to be affected by the description and operation of the first clause (exp. Wyld, 13 Jur. 133).

The next question is, who is a contributory, and what is the intention of the act with regard to the liabilities of the members of an association which is within it? And it has been decided, on the latter point, that the act does not touch the question of liability to the third parties, but only the liabilities of the members *inter se* (exp. Fenwick *re* the North of England Joint Stock Banking Company, 18 Law Journ., N. S., Chanc. 112; S. C. 13 Jur. 204). As to what makes a party a contributory, the following cases have been decided:—A father bought shares for and in the name of his son, who was a minor. The vendor declared, pursuant to the rules of the company, that the purchaser was of age, and the purchaser entered into a deed containing the usual covenants with respect to the shares; afterwards the father, by deed with the company, reciting the purchase of the shares for his son, covenanted that he should, on coming of age, execute the deed of settlement, and in the meantime fulfil all his liabilities. The father received all the dividends. It was held that the father was a contributory, although the son was the person registered in the books of the company (exp. Reaveley, *re* the North of England Joint Stock Bank, 18 Law Journ., N. S., Chanc. 110; S. C. 12 Jur. 1065). The ground of the decision was, that the father had contracted with the company; and when that circumstance did not exist, but there was merely a purchase of shares for sons with the father's money, and the shares were taken in the name of a trustee, whose name

alone was registered as a shareholder, the court held the father not a contributory, although there was an agreement between the father and the trustee that the dividends and profits should be paid to the father during the minority of the sons. By the same instrument it was agreed that, on their attaining their ages, the shares were to be transferred to the sons; and the father indemnified the trustee against liability in respect of the said shares. A shareholder in a joint-stock banking company died, and his executrix proved his will. His estate was insolvent. She never received any dividends on the shares, nor did any act required by the deed of settlement of the company to make herself owner of the shares. On the winding-up of the company under the 11 & 12 Vict. c. 45, the executrix was held to be a contributory, as executrix of her testator, in respect of the shares held by him (*exp. Thomas*, 13 Jur. 274). As to the circumstances that give rise to the application of the act generally, this point has been considered in two cases—*exp. Wylde*, above cited, and *exp. Troutbeck* (13 Jur. part 1, p. 157). In the former case it was held that the act was not intended to apply to the case of a solvent company, or a company that can carry on its affairs, merely to settle a quarrel between an individual shareholder of the company, although the company may, in point of form, have acted so as to be under the 5th article of the 5th section of the statute. The act is intended to enable companies that are insolvent, or that for other reasons cannot go on, to be wound up, and the conditions of the 5th section are intended as tests of that insolvency or incapacity; and, therefore, in the case secondly referred to, *exp. Troutbeck*, the act was held to apply, although there were no outstanding debts, and there was a decree for an account and contribution in a suit in equity, on the ground that the company could not go on, and that the very thing the act intended was to afford a company in such a position the means of avoiding the insurmountable difficulties attending the winding-up by a suit in chancery. In fact, as the Lord Chancellor said in *exp. Wylde* (13 Jur. 185), "the act professes to deal with companies unable to meet their pecuniary engagements; not only have we that as the title of the act, but it is obvious from the whole structure of the act, and from the injuries intended to be remedied, it was not intended to deal with companies that were solvent, carrying on their business, that might be prosperous, or at least could not come within the description of companies 'unable to meet their pecuniary engagements,' carrying into effect that provision of furnishing the means in the event of the companies failing to answer the purpose for which they were created—to facilitate the recovery of debts from such companies—to do justice between shareholders, some of whom might be called on to pay the obligations of the company beyond their share of the responsibilities. The object of this

act, and of the former one (7 & 8 Vict. c. 111), was to afford some test by which it should be ascertained whether the company did or did not fall within the description of a company unable to meet their pecuniary engagements—in short, a sort of act of bankruptcy of the company. The former act dealt with it as an act of bankruptcy, called an act of bankruptcy, and provided certain tests. The same identical tests that are applied to traders as evidence of their insolvency are applied as tests to the companies (see tests enumerated, *ante*, p. 64); and, in the event of the test being applied, and the company not being able to remove that test, it considers that as an act of bankruptcy in effect, and, therefore, subjects the company to the operation of the provisions for winding-up the concern. But all those tests are applied simply for the purpose of coming to a safer conclusion as to whether they do or do not fall within the description of companies whose affairs require winding-up, and as to whom, therefore, the policy of the act was intended to apply." It has also been held that the circumstance that a suit is depending on behalf of shareholders to make the directors personally liable for certain losses, is no objection to a contributory obtaining an order under the act (*exp. Walker*, 18 Law Journ., N.S., Chanc. 81). In a case to which we have before referred, when considering what companies are within the act (*Agriculturist Cattle Insurance Company*, *ante*, p. 167), which was brought before the Lord Chancellor by way of appeal (see 13 Jur. 415), it was decided that to induce the court to make an order for the dissolution and winding-up of a joint-stock company under the 11 & 12 Vict. c. 45, there must be shown to exist one of the tests of insolvency enumerated in the first six clauses of sect. 5, or some other test *ejusdem generis*; the court, however, will not look into the pecuniary affairs of the company to judge whether the order should be made (*Agriculturist Cattle Insurance Co.*, 13 Jur. 415). In this case it was also held that the retirement of a large body of the proprietors cannot be considered a dissolution of the company within the meaning of the 7th clause of sect. 5.

By the 8th clause of the 5th section a discretionary power is given to the court to wind up the affairs of the company. The words of this clause are, "Or if any other matter or thing shall be shown which, in the opinion of the court, shall render it just and equitable that the company should be dissolved." The Lord Chancellor (*Agriculturist Cattle Ins. Co.*, 13 Jur. 415), referring to the clause, said that the meaning of it was difficult to discover, the words being so large and indefinite. "The clause was no doubt so worded in order to include all cases not before mentioned, but of course it cannot mean that it should be interpreted other than *ejusdem generis*; that there must be something in the management and conduct of

the company, which shows the court that it should no longer be allowed to continue, and that the concern ought to be wound up.

We may here notice that by s. 123 of the act the judge may refer, or direct the Master to refer, the matters to the district commissioners of the Court of Bankruptcy or judges of the county court, (who are appointed masters extra of the Court of Chancery for the purposes of the act), and to direct that such district commissioners or judges shall have all the authorities, &c., given by the act to the Master. In a late case an order had been made on petition, on service on a member of the company under sect. 10 of the act. A petition was then presented by the same petitioners under the 123rd section, praying that, instead of the proceedings being taken before the master, the same might be removed to a district court of bankruptcy. The court made the order on service of the petition on the same party who had been served with the former, although the 123rd section does not provide for any notice (exp. Renshaw, 13 Jur. 274).

RECENT STATUTES (12 & 13 VICTORIA).

Excise and Stamps and Taxes Consolidation Act—Apprehension and Detention of Suspected Persons in Ireland—Vice-Guardians of Unions in Ireland—Buckingham Assizes—Appointment of Overseers in Cities and Boroughs—Indemnity Act—Larceny Amendment Act—Maintenance of Poor in Houses not being Workhouses—Costs of Distraint for Poor and Highway Rates.

Excise and Stamps and Taxes Consolidation Act. CHAP. 1.—This act is no otherwise important than as consolidating the boards of excise and of stamps and taxes. This consolidated board is to be called "The Commissioners of Inland Revenue."

Apprehension and detention of suspected persons in Ireland. CHAP. 2.—This act provides that persons imprisoned in Ireland for high treason, &c., may be detained till 1st September, 1849, and shall not be bailed or tried without an order from the privy council.

Vice-guardians of unions in Ireland. CHAP. 4.—This act provides that in cases in which boards of guardians have been dissolved, and paid officers appointed, the poor-law commissioners may continue them for a certain time.

Buckingham assizes. CHAP. 6.—This statute repeals the act of 21 Geo. 2, c. , which provides for the holding of the summer assizes at Buckingham, on the ground that the holding of the said

assizes at the said time is inconvenient to the inhabitants of the said county at large. By s. 2, the power, &c., of 3 & 4 Will. 4, c. 71, providing for the appointment of convenient places for the holding of assizes in England and Wales, by order from the privy council, is to extend and apply to the county of Buckingham, and every place therein.

Appointment of overseers in cities and boroughs. CHAP. 8.—This act was passed in consequence of doubts which were entertained as to the proper authority for the appointment of overseers of parishes comprised within certain cities and boroughs under the provisions of 43 Eliz. c. 2 (see Abr. Crim. Law Cases, p. 16). It is provided (s. 1) that justices of the peace having jurisdiction in certain cities and boroughs shall have the exclusive right of appointing overseers. Sect. 2 repeals that part of 43 Eliz. c. 2, s. 10, which renders the mayor, &c., liable to penalty of £5 for default of nominating overseers of the city, &c.

Indemnity Act. CHAP. 9.—This act indemnifies such persons in the United Kingdom as have omitted to qualify themselves for offices and employments, and extends the time for so doing until the 25th of March, 1850.

Larceny Amendment Act. CHAP. 11.—This act, which extends to England and Ireland, after reciting the 7 & 8 Geo. 4, c. 29, and 9 Geo. 4, c. 55, provides that transportation shall be done away with in cases of simple larceny, and for felonies by those acts made punishable like simple larceny. But by s. 2, tenants and lodgers stealing from houses or apartments let to them, if the value exceed £5, are to be punishable as before the passing of this act. And (s. 3) larceny, &c., after two previous summary convictions under recited acts, or 10 & 11 Vict. c. 82, or 11 & 12 Vict. c. 59, or 7 & 8 Geo. 4, c. 30, or 9 Geo. 4, c. 56, are to be punishable as before the passing of this act. Section 4 provides that in indictments against persons so twice summarily convicted, it shall be sufficient to state the fact, and certified copies of convictions are to be evidence.

Maintenance of poor in houses not being workhouses. CHAP. 13.—The purport of this statute is to give the poor-law commissioners the power of making rules and issuing regulations with respect to the management and government of any house or establishment (not being the union-house or workhouse) wherein any paupers shall be lodged, boarded, and maintained for hire or remuneration, under any contract or agreement entered into by the proprietor thereof with any guardians, &c., of the poor. The rules, orders, and regulations of the commissioners are enforceable, as orders, &c., are under the 4 & 5 Will. 4, c. 76. By s. 4, the poor-law commissioners may prohibit the reception or retention of paupers in any such house.

By s. 5, they may remove any officer, &c., of such house, whom they may deem unfit or incompetent to discharge the duties of his situation, or who shall refuse or wilfully neglect to carry into effect any of their rules, &c. And by s. 6, the commissioners may regulate the mode in which contracts shall be entered into for the lodging, boarding, or maintenance of paupers. By s. 7, the commissioners may appoint, either temporarily or permanently, persons to visit such establishments. By s. 8, the power of justices of peace to visit is the same as in the case of workhouses, and the board of health may appoint a superintending inspector to visit and examine such establishments. The act extends to England and Wales only, and does not apply to lunatic asylums and hospitals. It owes its origin to the unhappy Tooting case, and it is to be hoped that it may prove effective.

Costs of distraining for poor and highway rates. CHAP. 14.—Though by 43 Eliz. c. 2, and 5 & 6 Will. 4, c. 50, provision was made for recovering poor and highway rates, by distress and sale of the party's goods, yet no provision was made for levying the costs and expenses incurred by the overseers or the surveyors in the recovery of the same. This act cures this defect, and enacts (s. 2) that where a warrant of distress is granted for a poor-rate or highway rate, the costs of obtaining it may also be levied, together with the reasonable charges of the taking, keeping, and selling of the distress. Sect. 2 repeals so much of 43 Eliz. c. 2, as relates to commitments for non-payment of poor-rates *until payment*, and provides that where no sufficient goods are to be found, two or more justices may commit the party to the common gaol or house of correction for any time not exceeding three calendar months, unless the rate and costs be sooner paid. Sect. 3 provides that one warrant of distress for poor-rate or highway rate shall be sufficient against any number of persons in default. The warrants of distress may be directed to the churchwardens and overseers, or overseers, or the surveyors of the highways, and to the constable of the parish or township, and to any other persons, &c. By s. 5, the same parties may serve the summons either on the party personally, or by leaving the same with some person at his last place of abode; the party serving must attend the hearing; and if the party summoned fail to appear, the justices may proceed *ex parte*. Sect. 9 provides that hereafter no person shall be imprisoned for the non-payment of any *church-rate* for any time exceeding three calendar months.

TRINITY TERM EXAMINATION QUESTIONS.

COMMON LAW.

I. What is the usual mode of commencing an action at common law? II. When a writ has been served, what is the next step the plaintiff takes, and what must he take care is the state of the parties before he takes such step? III. Supposing personal service of a writ of summons cannot be effected, is there any and what remedy, and how is it to be obtained? IV. If a plaintiff apprehends, after service of a writ, that the defendant is going out of the jurisdiction of the court from whence the writ issues, is there any and what means of stopping him, and how is it to be effected? V. What is the meaning of the word venue, and what are the rules to be observed respecting it? VI. Has a defendant any power of altering the venue? and what are the necessary steps to be taken by him? and can it be done in every sort of action? VII. Is there any and what distinction between a judgment in an action of assumpsit and an action of debt? VIII. What is the usual mode of meeting a defective pleading? and is it available to either party? IX. When is a cause at issue? and can there be more than one issue in a cause? X. If a plaintiff resides abroad, or out of the jurisdiction of the court, what should the defendant do, and can he do it in any stage of the cause? XI. Is there any difference between a verdict for a defendant and a nonsuit? XII. What is the meaning of a judgment *non obstante veredicto*? how is it to be obtained? and what effect has it on the costs of the action? XIII. What is a feigned issue? in what cases is it resorted to? and by what authority is it framed? XIV. Is there any difference in the proceedings after a verdict on a feigned issue and a real issue as to enforcing the decision? XV. If at a trial a juror be withdrawn, what effect has it upon the costs of the cause?

EQUITY.

I. Can a married woman effectually dispose of property to which she will become entitled upon the happening of a future event? II. If a person has been appointed a trustee without his consent, and has not acted, and is not desirous to act, and a bill is filed against him, what defence should he make? III. If a woman after marriage becomes entitled to a legacy not given to her separate use, can her husband insist upon its being paid to him, although she wishes to have some provision out of it for her separate use? IV. A lease

is under covenant to insure against fire, in the joint names of himself and his lessor, and the lease contains a condition of re-entry in case of breach of any covenant in it; the lessee insures in his own name only, and the lessor commences an action of ejectment for the breach of covenant. Will a court of equity give any and what relief to the lessee? V. A party entitled under a devise to real estate in remainder, after the death of another who is in possession, is apprehensive that the validity of the devise may be questioned at law, on the death of the party in possession, and that the witnesses to prove the validity of the devise may then be dead. Will a court of equity give him any assistance, and in what manner? VI. A party entitled to stock, standing in the name of trustees, is afraid that it may be misapplied; what is the most speedy and summary mode of preventing the transfer? and under what statute is the remedy given? VII. A testator devises his real estate to A. and B., with power of sale, and of giving discharges for the proceeds of sale, upon trust to pay a legacy of £5,000 to C., to pay an annuity of £30 to D. for life, and an annuity of £500 to E. for life, and to pay the rest of the income to F. for life, and at the death of F. to convey the residue to G. and H. in equal shares: X. is his heir-at-law; G. files a bill for the administration of the trust under the direction of the court. Who are the necessary parties to the suit? VIII. In what cases ought the heir-at-law of a deceased person to be party to a suit for the administration of the estate of such person? IX. A party entitled to a fund in the hands of trustees, executes an assignment of it by way of security for money borrowed. Is anything, and what, besides the assignment, necessary for the effectual security of the lender? X. An executor has advertised for creditors of his testator; has paid all debts of which he had notice, and those are by simple contract; and he has distributed the residue amongst the legatees without any decree having been made for the administration of the estate. Afterwards a specialty creditor, of whose debt he had no notice or knowledge, files a bill for the administration of the estate. In taking the account, is the executor entitled, as against such specialty creditor, to take credit for the payments made to the simple contract creditors and to the legatees, or either and which of them? XI. Under the usual decree for the administration of an estate, is an executor or administrator entitled to retain a debt due to himself in preference to other creditors of equal degree? XII. What is the effect as against a creditor of a decree for the administration of the estate of his deceased debtor? XIII. In a suit for the administration of an estate, one of two executors defendants dies pending the suit: is the suit thereby abated? and is it necessary to bring the representative of the deceased executor before the court? and for what purpose? XIV. In what cases does the Court of Chancery, upon granting an

injunction, direct an issue to be tried in a court of law? and for what purpose is such issue generally directed? XV. What is the object and effect of inrolling a decree?

BANKRUPTCY.

I. Describe the mode of proceeding to obtain an adjudication in bankruptcy. II. State the principal acts of bankruptcy on which a fiat can be maintained. III. How can a trader be compelled to commit an act of bankruptcy? IV. Under what circumstances may an attorney or solicitor become liable to the bankrupt laws? V. How and when can a bankrupt dispute the validity of the adjudication against him? VI. State the usual course of proceeding at the several public meetings under a fiat. VII. Can a trader take any and what steps to obtain a fiat against himself? VIII. In what cases may articles of merchandise be sold without subjecting the vendor to the bankrupt laws? IX. Are members or subscribers of a trading company liable individually to be made bankrupt? and give the authority for your opinion. X. What is the course of proceeding to obtain a fiat against a joint-stock company? XI. What is the law with respect to the property of third persons in the bankrupt's possession at the time of the fiat? State the general rule and the exceptions if any. XII. Where a creditor holds a security legal or equitable, but which is insufficient to pay his debt, what steps must be taken in either case to prove for the deficiency? XIII. What power have the assignees in regard to leasehold property held by the bankrupt which they deem of no value? XIV. Can an assignee be a purchaser at a sale of the bankrupt's property in any and what circumstances? XV. State the circumstances which will constitute a fraudulent preference to a creditor, and entitle the assignees to recover the effects transferred.

CONVEYANCING.

I. What is the distinction between uses and trusts? II. What is a chattel real? III. What are the rights of the husband in the chattels real of his wife? IV. What is understood by "uses in strict settlement?" and state an instance of such uses. V. What is the difference between a lease for the life of the lessee, and a lease for 99 years, if the lessee shall so long live? VI. What difference is there between the liability of the lessee and the liability of an assignee of the lessee, in regard to breaches of covenant? VII. How does such liability of the assignee of the lessee differ from the liability of the lessee's executor? VIII. In what case is a lease for years, made by a tenant for life, binding on those in remainder after his death? IX. What length of title is it the practice to require on behalf of a purchaser of a freehold estate? X. What is

the usual mode of verifying a pedigree? XI. When does a judgment at law become a charge on real estate? XII. Should any, and what search, and where, be made for any and what incumbrances against a vendor of real estate? XIII. What formalities are now required for the valid execution of a will of real estate? XIV. What powers should be given to the trustees of a will of real estate directing sales and declaring trusts of the proceeds that may last many years? XV. What is requisite to make effectual the deed of a married woman not relating to her separate estate?

CRIMINAL LAW.

I. Upon an indictment against an accessory either before or after the fact, is the record of the conviction of a principal received as conclusive evidence? or is the party indicted at liberty to controvert by other evidence the guilt of the principal? II. What special facts are the jury bound to find, if upon a trial for treason, murder, or felony, they acquit on the ground of insanity? III. In what cases is a defendant in misdemeanor entitled to traverse? IV. Can counts for distinct misdemeanors be included in the same indictment in any and what cases? V. What is necessary in order to enable a prosecutor to give in evidence a former conviction? and how and at what period of the proceedings against a prisoner must it be proved? VI. Define the crime of burglary and the evidence necessary to sustain an indictment for burglary? VII. In what cases may the crime of burglary be now punished with death? VIII. What is the evidence necessary to support an indictment against a bankrupt under the statute 6 Geo. 4, c. 16, for removing, concealing, or embezzling part of his estate, to the value of £10, and upwards? IX. Can an indictment for forgery be maintained in a case where it is shown that no such person as that whose name appears upon the instrument exists? X. State what are the necessary proofs to support an indictment for wilful and corrupt perjury? XI. What is subornation of perjury? and what are the necessary proofs to support an indictment for such an offence? XII. To what court must an application for a criminal information be made? and what are the essential differences between proceedings by criminal information and by indictment? XIII. How many persons must be concerned in the commission of the offence in order to support an indictment for a conspiracy? XIV. Can an indictment for conspiracy be supported against a husband and wife only? and give the reasons for your answer. XV. Can an indictment for conspiracy be supported although the object for which it was entered into be not effected?

NEW COUNTY COURTS.

Costs—Suggestion—Bill of Exchange—Costs of signing judgment.

—In an action by the indorsee against the drawer of a bill of exchange for a sum less than £20, the defendant traversed the notice of dishonour, and it appeared at the trial that the bill had been drawn and indorsed within the jurisdiction of the country court where the defendant resided, but that the notice of dishonour was given elsewhere: Held, that the plaintiff was deprived of his costs by the 129th section of the 9 & 10 Vict. c. 95. The above case having been tried in vacation, the plaintiff signed judgment on the day of the trial; on which the defendant got a summons to stay proceedings; the court set aside the judgment, and would not allow the plaintiff the costs of it (*Betteley v. Buck*, 13 Jur. 368).

Set-off—Balance of account.—The following is a very important decision as to the plaintiff's right to sue in the superior courts where the defendant has a set-off, and there has been no settlement of accounts. The plaintiff in an action in a superior court proved a debt due to him from the defendant of more than £20. The latter, by his set-off, pleaded and proved, reduced the plaintiff's claim to a sum (for which the jury returned their verdict) less than £20. Held, that the defendant was not entitled to enter a suggestion to deprive the plaintiff of his costs, under 9 & 10 Vict. c. 95 (*Woodhams v. Newman*, 13 Jur. 456). *Per Wilde, C.J.*: "What was the amount of the plaintiff's demand? Clearly above £20. The county court, therefore, must have adjudicated upon and established a claim for a sum exceeding £20. Then it must have turned to the defendant's case to see how that claim was to be reduced, and in like manner have decided upon a case involving a separate claim beyond £20; thus in reality deciding two actions, in each of which the amount in dispute exceeded the sum to which its jurisdiction extended. How, then, was the plaintiff to proceed in levying his plaint? It is extremely difficult to see; for suppose he had levied his plaint for £20, he must have abandoned the excess; and, if the defendant pleaded a set-off, it would have been a good answer. If he had entered a plaint for the full amount of his claim, it would have shown on the face of it that the court had no jurisdiction. He is in the difficulty of not knowing whether the defendant will rely on his set-off or not; he cannot prevent it by giving credit, for in very many cases a plaintiff has no means of ascertaining the precise amount or nature of the defendant's claim. I do not see in such a case as the present, where the plaintiff claims a large sum, which is liable to be

reduced by a set-off, how he is to levy a plaint in the county court. I think, therefore, that the case is neither within the express words or the meaning of the act. It never could have intended that these new courts should discuss claims of such unlimited amount."

Attorneys' fees, &c.—The effect of the decision in *exp. Clipperton* is that an attorney cannot recover, *even from his client*, more than the fee of 10s. or 15s. prescribed by the County Courts Act, for all the work done, however extensive, in relation to a suit in the county court (13 Law Times, 271).

Set-off.—It has been decided that a prohibition may issue where a plaintiff is suing for a sum, after deducting a set-off, less than £20, but which without that sum would be more than £20 (*Beswick v. Copper*, 13 Law Times, 258).

Suggestion to deprive of costs—London court—Cause of action in two places.—When an affidavit, made for the purpose of obtaining a rule to enter a suggestion on the roll to deprive the plaintiff of costs, does not say that the whole debt arose within the jurisdiction of the City of London, but that part arose in one part of the city and another part in another, it is sufficient for the suggestion (*Orgill v. Stinson*, 13 Law Times, 260).

Costs—Judgment by default.—The important point before alluded to (p. 47) as being doubtful, namely, whether a plaintiff could be deprived of costs where the defendant has suffered judgment by default in the superior court has lately been decided in the negative, though not without a difference of opinion. Three of the judges of the Common Pleas—Wilde, C. J., JJ. Coltman and Williams—held that, where the defendant suffers judgment by default, he is not entitled to enter a suggestion to deprive the plaintiff of costs, under the 9 & 10 Vict. c. 95, s. 129, though upon a writ of inquiry the jury have assessed the damages at only 40s. Mr. J. Cresswell dissented from this view (*Reed v. Shrubsole*, 13 Jur. 497). C. J. Wilde, after referring to the early part of s. 129, which provides that if a verdict be found for the plaintiff for a less sum than £20, if founded on contract, or less than £5 if founded on tort, the plaintiff "shall have judgment to recover such sum only, and no costs," said: "The section then proceeds, 'and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs, as between attorney and client.' Now, this part of the clause cannot apply where there has been a judgment by default, where the verdict must be found for the plaintiff. It has passed the stage of the verdict, and judgment of the court has been had, although, it is true, only interlocutory; and when I consider the concluding words of the clause, 'unless in either case the judge who shall try the cause shall certify, on the back of the record, that the action was fit to be brought in such superior court,' I have still greater difficulty in say-

ing that the absence of a verdict upon a trial is to subject the plaintiff to double costs, for the plaintiff does not fail in his action, but it is so well founded that he has judgment by confession. This is a strong argument to show that the case contemplated by the act was where the cause proceeds to trial, and where the verdict becomes necessary to warrant the judgment. There are many cases where the court assess damages without the intervention of a jury; and it is to be contended that, in all these cases, the plaintiff is not only not to have costs, but is to be liable to pay them to the defendant. I can see in such cases many which may embrace the most important matters, as well as those which are frivolous. It appears to me, looking at the whole of the clause, that the Legislature had not in contemplation the case of judgments by default, and that consequently the plaintiff is entitled to his costs in this action."

NOTES OF RECENT LEADING CASES

COMMON LAW.

BANKERS.—*Duty of in paying customers' cheques—Authority to apply funds in hand*—[*Keymer v. Laurie*, 13 Jur. 426]. This case, though involving no great principle, is one of some practical importance as to the respective positions of bankers and customers. The action was in a case against defendants for not honoring plaintiff's cheque for £7 11s. It appeared in evidence that on the 20th of March the balance in plaintiff's favour was £21 4s. On that day an acceptance of plaintiff, made payable by him at defendant's, for £42 was presented and paid. The cheque for £7 11s. (for not honoring which the action was brought) was presented a week afterwards. On the 20th, after the acceptance had been paid, a clerk of defendant's called on the plaintiff to know what should be done about that acceptance, not stating that it had been paid; the plaintiff directed that it should not be paid; the clerk endeavoured to get the money back, marking the acceptance as paid and cancelled by mistake, but did not succeed; and defendants on the 24th of March honored a check drawn by plaintiff for £13 13s. The court held that the defendants had authority to apply the funds of the plaintiff in their hands towards payment of the acceptance; and that what took place afterwards did not alter or destroy the authority (*Keymer v. Laurie*, 13 Jur. 426.) *Per Patteson J.*: "The plaintiff, by making the acceptance payable at the defendants', clearly authorised them to pay it, and, if the balance in his favour had been £42

on the 20th of March, they would have been bound to pay it, unless the plaintiff, before it was presented, had countermanded that authority. They were not, indeed, bound to pay it under the existing circumstances, because they had not sufficient funds; but they were fully authorised to apply what funds of the plaintiff they had towards the payment. Whether they could recover from the plaintiff the additional sum which they had advanced to make up the £42—which was necessary to be advanced, since the holders would probably not have taken part only, nor is it customary to offer a part payment—it is not necessary for us to determine. That question might depend on the course of their dealings, and other circumstances which are not before us."

BILL OF EXCHANGE.—*Indorsement per procuration*—*Agent's authority*—[*Alexander v. McKenzie*, 13 Jur. 346].—An indorsement "per procuration" imports that the indorser acts under a special authority, and a person who takes a bill so indorsed does it at his own risk. He is bound to satisfy himself as to the extent of that authority (*Alexander v. McKenzie, Public Officer, &c.*, 13 Jur. 346). *Per Coltman, J.*: "If a firm or company carrying on business allow a clerk or manager to indorse bills in his own name on behalf of the company, and to pass them into circulation without any notice to the public that his authority is limited, the public is not called upon to inquire into the extent of the authority, for it purports to be general, and by the acts of the manager the company are bound. But that is not what has been done here. The bill was indorsed "per procuration," which amounts to a special intimation to the public that the indorsement was not the act of the bank, but the act of a person professing to have their special authority, and the person who takes the bill must be considered as taking it on the faith of that representation. He is aware of the capacity in which the indorser acts who styles himself a procurator, and must make such inquiries as are necessary for his own safety. This doctrine was laid down in the case of *Attwood v. Munnings* (7 Barn. and Cr. 278), and by *Parke, J.*, in *Withington v. Herring* (5 Bing. 458), and I assent to that doctrine. This rule, therefore, must be discharged."

BILL OF EXCHANGE.—*Proof by indorsee of consideration for bill where fraud, &c.*—[*Delany v. Newland*, 1 Ir. Jur. 238].—It is laid down in *Selwyn's Nisi Prius* (p. 408, 11th edit.) that where a note has been given under such circumstances that the payee cannot recover on it, the indorsee must prove that he became so for a valuable consideration, and this though no notice be given to him to produce such evidence. In *Heath v. Sansom* (2 Barn. and Adol. 29) it was held that where the note or acceptance has been obtained by *felony, fraud, or duress*, proof of valuable consideration on the part of the indorsee is requisite. In *Mills v. Barber* (1 Mees. and W.

425 ; S. C. 5 Dowl. 77), Lord Abinger says : " If a man comes into court without any suspicion of fraud, but only as the holder of an *accommodation* bill, it may fairly be presumed that he is a holder for value. The proof of its being an accommodation bill is no evidence of want of consideration in the holder ; * * unless, therefore, the bill be connected with some *fraud*, and a suspicion of fraud be raised from its being shown that something has been done with it of an illegal nature, or that it has been clandestinely taken away, or has been lost or stolen, in which cases the owner must show that he gave value for it, the *onus probandi* was cast upon the defendant." However, in one case in Ireland (Howard v. Shaw, 9 Ir. L. Rep. 335) the judge held that, even supposing evidence to be given of fraud in inducing the defendant to make the note, yet the onus of proving consideration was not thereby thrown on the plaintiff, the *indorsee*, unless the evidence affected him with notice of or participation in the fraud, or it was shown that he took the note after it became due, or without any consideration. This case and its doctrine was much considered in a more recent Irish case, and the rule of the English courts adopted. In the case alluded to, which was an action by an indorsee against the acceptor of a bill, the defendant gave evidence that the bill was fraudulently filled for a larger sum than had been agreed upon between the drawer and a person who was no party to the bill, but to whom the drawer had sent the stamp, signed in blank ; it was held that such evidence was sufficient to throw upon the plaintiff the burthen of proving consideration (*Delany v. Newland*, 1 Ir. Jur. 238). C. B. Pigot, after referring to several cases, among which are *Smith v. Martin* (9 Mees. and Wels. 304) ; *Whitaker v. Edmonds* (1 Adol. and El. 638) ; *Arbouin v. Anderson* (1 Q. B. Rep. 498) ; *Shearm v. Burnard* (2 Per. and Dav. 565) ; and also the judgments in *Isaac v. Farrer* (4 Dowl. 750 ; S. C. 1 Tyrwh. and G. 281), said : " Before I refer to other cases on this subject, it is necessary to observe that in *Howard v. Shaw* it was not necessary to decide this question ; the question there turned upon the absence of consideration. In *Bramah v. Roberts* (1 Scott, 350 ; S. C. 1 Bing. N. C. 469) it was held, that when the defendant set up by his plea a case of fraud, a replication stating that the plaintiff was an indorsee for value, without notice of the fraud, was a good answer to the plea ; and *Smith v. Martin* is to the same effect. There the Lord Chief Baron Abinger refused, at the trial, to call upon the plaintiff to begin by proving fraud, as the affirmative of that allegation lay upon the defendant, who raised the question by his plea. Both those cases turned upon their respective pleadings, and *Edmonds v. Groves* (2 Mees. and Wels. 642 ; S. C. 5 Dowl. P. C. 775) is to the same effect as *Smith v. Martin*. In *Bingham v. Stanley* (1 Gale and Dav. 237 ; S. C. 2 Q. B. 117) the Court of

Queen's Bench expressly differed with the opinion of the Court of Exchequer in *Edmonds v. Groves*, applying the old principles to the new law of pleading, holding that an admission on the record of fraud would throw the onus of proving consideration upon the plaintiff, the Court of Exchequer holding such admission to be sufficient for that purpose. This question was not raised in *Bramah v. Roberts*. The rule established by a long line of decisions, that if the note were proved to have been obtained by fraud or affected by illegality, would cast upon the plaintiff the burthen of showing he was a *bond fide* indorsee for value, was again determined in the case of *Bailey v. Bidwell* (13 Mees. and Wels. 73), which case was not brought under the consideration of the Court of Queen's Bench in *Howard v. Shaw*. In the former case the illegality was proved, and the court was called upon to say that the plaintiff should have proved that he had given full consideration, the question directly and pointedly arose. Parke, B., in his judgment, says, 'It certainly has been, since the later cases, the universal understanding that if the note were proved to have been obtained or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it, and that such proof casts upon the plaintiff the burthen of showing that he was a *bond fide* indorsee for value.' On these authorities we must hold that the evidence in this case was sufficient to cast this onus upon the plaintiff, and therefore he should have proved consideration."

INSURANCE.—*Life policy—Proposal and declaration—Fraudulent concealment or untrue allegation—Materiality of answer not a question for jury*—[*Bennett v. Anderson*, 1 Ir. Jur. 245].—This case as to the effect of a proposal and declaration on an insurance of a life, and as to fraudulent concealment and untrue allegations therein deserves attention, as carrying out the rule hinted at in the case of *Geach v. Ingall* (14 Mees. and W. 95; S. C. 9 Jur. 691), and more distinctly enunciated in *Scanlan v. Sceals* (6 Ir. L. Rep. 367). In the case we refer to, which was a decision of the Queen's Bench in Ireland, the action was one of assumpsit on three several policies of assurance on life; each of them contained a provision declaring that it should be void "if anything stated by the assured, either in the declaration or attestation therein before mentioned to have been made by him, should not be true." The proposal for insurance contained the following particular:—"Has the party's life been accepted or refused at any other office, and, if accepted, was it at the usual premium, or with what addition?" The answer returned by the assured was, "Asylum and National Office, at the usual premium." The following agreement appeared at the foot of the proposal, and was signed by the assured:—"I hereby agree that the proposal

mentioned in the above policy shall form the basis of the contract between the assured and the company; and if there be any fraudulent concealment or untrue allegation contained therein, all money which shall have been paid on account of this insurance shall become forfeited, and the policy void." The defendant proved at the trial that the assured had proposed the same party's life for insurance at two other offices previous to effecting the insurance with the defendant's company, and that his proposal was rejected. The judge, in summing up, stated to the jury that it was for them to say whether there had been a concealment by the assured of any circumstance which it was material for the company to know. Held, that this was a misdirection, for that the assured had contracted with the defendant's company that the several matters contained in the proposal should be answered truly, and, consequently, that the question, whether an answer given was more or less material, was not open to him (*Bennett v. Anderson, supra*).

LIMITATIONS, STATUTE OF—3 & 4 Will. 4, c. 27, s. 14.—*Acknowledgment—Insolvent's schedule*—[*Hobson and others v. Burns*, 1 Irish Jur. 227].—By sect. 14, of 3 & 4 Will. 4, c. 27, an acknowledgment of the title of a person entitled to any land or rent, given by the person in possession or in receipt of the profits of such land, or in receipt of such rent, is equivalent to the possession or receipt of or by the person to whom the acknowledgment is given, for the purpose of preventing the statute of limitations from barring his rights. In a recent Irish case, the question was raised whether a statement by an insolvent in his schedule, amounted to an admission. The points actually decided were that a statement in the schedule of an insolvent debtor, in the year 1828, that she had been "defeated" in 1824, in a former ejectment brought on the demises of three lessors of the plaintiff, one only of whom was a lessor in the present action, was no acknowledgment of title within the 14th section of the 3 & 4 Will. 4, c. 27, in any one of the said lessors. Also, that such statement did not amount to more than a mere narrative of a past transaction, and was not an acknowledgment of title within the 14th section. And, indeed, it was doubted whether a statement by an insolvent in his schedule is, under any circumstances, a sufficient acknowledgment within the 14th section (*Hobson and others v. Burns*, 1 Irish Jurist, 227). C. J. Blackburne, in delivering judgment said: "Two objections have been taken to the position, that these statements comply with the requirements of the statute. The first was, that there was no acknowledgment of the title of any one in particular. There are here four lessors of the plaintiff, and the name of the party who now seeks to avail himself of the acknowledgment was not specified in the schedule. In fact, the only party at present before

the court who was so named was the lessor Hobson. It is quite ambiguous of *whose* title this was an acknowledgment. In my opinion it is quite impossible to hold it to be an admission of the title of *any* person. The other objection is more substantial in its nature—namely, that there is no recognition of any *existing* title. That objection appears to me a perfectly valid one. The recognition which the statute contemplates is such as when once made by a party in possession, shall actually and virtually vest in the person to whom it is made a present title. The construction of the 40th section confirms this view of the 14th section, both having precisely the same object—namely, the recognition of a present right of possession. Could it be for a moment held that a present recognition of a right of entry, no matter how remote, could confer a title to recover? In other words, how could an acknowledgment in 1828 of a title in 1824 operate as an admission of a present right? According to the argument of the plaintiff, such a recognition might refer to a period fifty years back, and nevertheless create a title contemporaneous with the making of the statement. What is set forth here amounts to nothing more than that in 1824 the party held the premises under a certain lease which had been evicted by title paramount; and this, as has been observed, is merely a narrative of the facts, and by no means such a recognition of title as is required by the statute."

LIMITATIONS, STATUTE OF—21 Jac. 1, c. 16—*Party dying abroad—Executors*—[*Townsend v. Deacon*, 13 Jur. 366].—A party, whether Englishman or foreigner, to whom a cause of action accrues while abroad, has always the right of action in him while he continues abroad, and if he dies abroad his executors may sue for it, although more than six years have elapsed from its accruing. *Sed quare*, whether, under such circumstances, the executors are not bound to sue within six years after his death (*Townsend v. Deacon*, 13 Jur. 366). *Per* Pollock, C. B.: "Here is a man abroad with a right of action; it is conceded on all hands that if he returned he might sue at any time within six years after his return; but it is contended that, if he dies abroad, or even while returning for the express purpose of bringing an action, his executors, to whom, so far as they are concerned, a right to sue has resulted within six years, are to lose all. There is nothing in the statute to warrant so absurd a consequence. Then it is said that certain cases have produced the doctrine that under such circumstances the executor must sue within a year, or some other reasonable time, after the cause of action has accrued to him; but I find nothing whatever in the statute about reasonable time, or about a year. The courts have indeed held, under the 4th section, that where proper process has been issued by the executor, and the statute runs

out before judgment, the equity of the statute will apply so as to enable him to take up the action, but there is nothing of the kind here. We have likewise an express authority on this question in the case of *Strithorot v. Græme* (3 Wils. 145), of which there is also a note in 2 W. Black. 723. There it is said, 'If a plaintiff is a foreigner, and doth not come to England in fifty years, he still hath six years after his coming to England to bring his action; and if he never comes to England himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death.' That applies as much to an Englishman who goes abroad before the cause of action accrues, as to a foreigner who is always abroad. Now, executors represent the person of a testator; whatever rights he had they take as representing him; and as, if the testator had returned he might have brought this action, I think his executor may do so likewise. It is not necessary to discuss whether the executor could bring the action after the six years had expired; it will be sufficient time to decide that point when it arises."

RESTRAINT OF TRADE.—*Contract in restraint of trade—Agreement of hiring and service.*—We have before (*ante*, p. 29—36) fully considered the subject of contracts in restraint of trade, and now, therefore, need only call attention to the following case:—A. contracted to serve B. and his partner or partners for the time being, for seven years, in his business of a glass and alkali manufacturer, and at all times during the term to do his best endeavours and use his utmost care and diligence in the works; and, further, that he would not at any time during the term neglect or absent himself from the said service without the consent in writing of B. or his partner or partners for the time being, or either or such of them as should carry on the business; nor would work for or serve any other person or persons without such consent; in consideration of which service B. agreed to pay A. 24s. per week for a certain amount of work, and to find him some other description of work, provided he should not require that quantity of the specified work, so that A.'s wages should not be less than 24s. per week, except when a furnace should be out, when A. agreed to work for 21s. per week; and it was agreed, that if A. should be sick, or otherwise incapacitated from performing the service, or in case of misconduct, or if B., or his partner or partners for the time being, or either or such of them as should carry on the trade, should discontinue the trade during the term, in either of such cases B. or his partners should be at liberty to retain or employ any other person in the room or stead of A., without being obliged to pay him any wages or satisfaction: Held, that this agreement was not void for want of mutuality, or as being in unreasonable restraint of trade. *Hartley v. Cummings*, 5 Com. Bench Rep. 247.

SURETIES.—*Contribution—One surety receiving indemnity, &c.*—

[*Done v. Whalley*, 2 Exch. Rep. 199].—In Smith's Leading Cases (vol. 1, p. 71) it is said: "On the same ground as the liability of a principal to reimburse his surety depends the right of one surety or joint contractor, who has been obliged to satisfy the whole demand to recover a proportionable contribution from his fellow surety or contractor. He is a person who has been compelled to satisfy a demand, parcel of which his fellow was compellable to satisfy; though, indeed, if one have become surety at the instance of the other, particularly if that other have received from the principal a *separate indemnity for himself*, it will be different" (see *Turner v. Davies*, 2 Espon. 478). The Court of Exchequer has held, in a late case, where one of the co-sureties of a bond received from his principal a promissory note to the amount of that instrument, that it was a question for the jury to say *quo animo* the note was given, and whether it was given in pursuance of an arrangement that the defendant should be thereby discharged, or merely by way of collateral security, in which latter case the defendant would be liable for contribution on payment of the bond by his co-surety (*Done v. Whalley*, 1 Excheq. Rep. 199).

EQUITY.

NOTICE.—*Constructive notice to purchaser for valuable consideration—Notice of a tenancy and the interests of the tenant—Notice of a substituted agreement* [*Penny v. Watts*, 13 Jur. 459].—The doctrine of notice in equity is now pretty well established, and the chief difficulty about it generally arises in applying it to the circumstances of each case. The above case furnishes an instance of this difficulty, inasmuch as the Lord Chancellor held the defendant to be affected with notice, whilst Vice-Chancellor Knight Bruce held him *not* to be affected with notice. The principle was not disputed, but its application was. We may just state that the general rule is, that what is sufficient to put a party upon an inquiry is good notice—that is, where a man has sufficient information to lead him to a fact, he shall be deemed cognisant of it (Com. Dig. tit. "Chancery," 4 C.; *Smith v. Low*, 1 Atk. 489). And with reference to the case we are about to mention, it may be stated that it has been decided that, where an intended purchaser has notice of a tenancy, he is affected by whatever interests the tenant may in fact have, though very different from what might have been expected (16 Ves. 249; 17 *Id.* 433; 1 Meriv. 282). In the case of *Penny v. Watts*, the defendant, a purchaser for valuable consideration (marriage), insisting upon his title as such without notice of plaintiff's title, admitted that he had notice that E., plaintiff's late wife, had released R., defendant's wife, by whom he acquired the estates, from a legacy, and that in lieu thereof R. had devised to her B. Hall, part of the estate, E. having

died before the marriage of defendant with R. : Held, that he had *constructive* notice of a *second* agreement made, subsequently to the admitted agreement, on the marriage of E. with plaintiff, whereby E. released R. from the legacy, and, in consideration thereof, R. agreed to convey or devise her real estates to E. and plaintiff in fee, to commence from her death, plaintiff being also in the occupation of B. Hall at the time of defendant's marriage with R. *Quere*—is the rule as to the constructive notice to a purchaser of the rights of an occupying tenant confined to matters relating merely to his tenancy, or does it extend to all interest which the tenant may claim in the premises in his possession? *Quere*—what effect has the circumstance that, at the time of the purchase, the occupying tenant did not know of his right upon the above rule as to constructive notice? (*Penny v. Watts*, 13 Jur. 459). *Per* Lord Chancellor: "The defendant admits that previous to the marriage he had notice that E. had given up her legacy, and that, in lieu thereof, Rebecca Watts devised to her the estate of Broadwood Hall. Now, these two facts coming to the knowledge of the defendant, one party giving up a valuable pecuniary consideration, and the other in lieu thereof devising a certain estate, I think it is not carrying the doctrine of the court further than it has often been carried, to say that, knowing these facts, you were bound to inquire how those facts took place, and that, as you knew that the one party gave up the legacy, and that in lieu thereof the other party had devised the estate, you cannot afterwards, if the fact be proved, say that you had not that sort of knowledge which would affect you with constructive notice of that which, if the facts be proved to exist, would show that the plaintiff had an equitable title by contract to have the estate so devised. Now, there is a case of *Taylor v. Baker* (5 Price, 306), which certainly embraces the whole of that proposition. In that case, A. made an equitable mortgage to B., and, on giving a second security to C., told him that he had given a judgment or warrant of attorney, not an actual security; not a mortgage, but a judgment or warrant of attorney for money borrowed; and it was held that, having such information, he was bound to *pursue the inquiry further*, and, if he had, it then would have turned out, as the fact was that there was an actual security given on the land, that that was a notice *de facto*, leading the party to further investigation, and, being in that position, he cannot set up the fact of his being purchaser without notice. If, therefore, the facts are as stated by the plaintiff, I cannot think this is a case in which the defendant is entitled to protect himself as a purchaser for a valuable consideration without notice."

POWER.—*Aiding defective execution—Charity.*—In the case of copyholds devised to charitable uses, the want of a surrender was prior to the 9 Geo. 2, c. 36, relieved against, and this, it is said, not

by the discretion of the court, but by the strong and general words of the statute of charitable uses, 4 Eliz. c. 4 (see 1 Fonbl. Equity, B. I, ch. 1, s. 7, n. w; Att.-Gen. v. Burdett, 2 Vern. 755). Now, it is a rule that wherever courts of equity supply any defect in the surrender of a copyhold estate, they will interfere in the cases of defective executions of powers, and consequently the defective execution of a power would be aided in favour of a charity. There was till lately only one case to this effect, and that a very old and imperfect one, namely, *Piggot v. Penrice* (Prec. Chanc. 471, n.). It has very recently, however, been decided by Vice-Chancellor Wigram, in accordance with the case just cited, that the defective execution of a power will be aided in favour of a charity (*James v. Sayer*, 13 Jur. 402). The Vice-Chancellor said, as to aiding the defective execution of the power: "Upon examination of the cases, it appeared that there was one express decision at least (*Piggot v. Penrice*) in favour of what was asked by the charities; and that there were dicta of learned judges in other cases concurring with that decision. The question, therefore, was, whether he (the Vice-Chancellor) ought, by a decision of his, to shake that which, ever since the stat. 43 Eliz. c. 4 (if not before), had been considered the settled law upon the point. It could not be denied that there was the highest authority for the proposition that the surrender of copyholds would be supplied in favour of a charity; and it had been laid down by an eminent judge that the execution of a power and a surrender of a copyhold go hand in hand precisely on the same ground (*Chapman v. Gibson*, 3 Bro. C. C. 219). Wherever the court would supply the surrender of a copyhold, the conclusion followed that, in an analogous case, it would aid the defective execution of a power, which, by analogy, was a strong authority for the proposition contended for on behalf of the charities. So, in the case of a gift or appointment by a tenant in tail without recovery or fine, it had been decided that the transaction would be supported in favour of a charity, though not for a wife, child, or creditor; the court, in that case, for some reason or other, carrying the rule further in favour of a charity than for a creditor. Another ground for holding that the charities were entitled, notwithstanding the defect in the execution of the power, was, that the proposition contended for on their behalf was referred to as a settled principle of law by text writers of the highest authority and experience. The opinion of text writers, though not to be considered as conclusive, was of great weight, supported as it was in this case by previous dicta and decisions. The last argument for the charities was grounded upon the principle by which the court had been guided in the decisions and dicta previously referred to. The principle upon which the court had acted was this: that if a party, having power by his own act to give property, clearly showed an

intention in writing to give it, there, although the writing, by reason of some informality, was ineffectual for the purpose intended, yet, inasmuch as the party might, by a formal instrument, have carried his object into effect, and inasmuch as he had shown an intention so to do, the court would, in favour of a charity, decree in aid of the intention. There was very high authority for saying that this was the law independently of the statute of Elizabeth, and it certainly has been so since the statute."

CONVEYANCING.

ASSIGNMENT OF CHATTELS.—*Insolvent—Assignment or bill of sale not enforceable*—[*Parrott v. Congreve*, 13 Jur. 398].—This case, if eventually sustained, will have a most unexpected effect in rendering bills of sale less valuable as securities, inasmuch as the insolvency of the party giving such an instrument will have the effect of superseding its efficacy as an assignment or bill of sale, if it have not been previously enforced by actual sale. By sect. 21 of 7 & 8 Vict. c. 96, it is enacted that in all cases where any petitioner for protection from process, whose estate shall have been vested in an assignee or assignees, shall have executed any warrant of attorney, or given any cognovit or *bill of sale*, whether for a valuable consideration or otherwise, no person shall, after the filing of the petition of such petitioner, avail himself of any execution issued upon any judgment on such warrant or cognovit, either by seizure and sale of the property of such petitioner, or by sale of such property theretofore seized, or *avail himself of such bill of sale*; but that any person to whom any sum of money shall be due in respect of any such warrant or cognovit, or of such *bill of sale*, shall and may be a creditor for the same. In the case we have referred to personal property was assigned by a debtor as a security, with power to take possession and sell. More than a year afterwards the creditor took possession. A month after that the debtor filed his petition for protection under the Insolvent Act. The creditor was restrained at the suit of the assignee under the insolvency from proceeding to a sale (*Parrott v. Congreve*, 13 Jur. 398). The Vice-Chancellor of England, after referring to sect. 19 of the act, and to the language of sect. 21, said: "Sect. 21 does not deal with the validity of the contract or the bill of sale; but, leaving the *validity* of the bill of sale unaffected, declares that, where a petition has been presented, and by the act the estate and effects have been vested, no person shall avail himself of the bill of sale, but the party shall come in under the insolvency. It appears to me, therefore, that the bill of sale is not touched, and remains as it was; and if anything is hoped to be derived by the delivery, why the delivery is void [meaning under s. 19, which we conceive does not apply]; but, if the bill of sale is good, the party

cannot avail himself of it now, and, if he seeks the benefit of it, it must be under the insolvency."

ASSIGNMENT OF CHATTELS.—*Act of bankruptcy—Good against subsequent creditors*—[*Oswald v. Thompson*, 2 Exch. Rep. 215].—This case decides that a deed for the transfer of a trader's property is not void as against future creditors, although the execution of it be an act of bankruptcy under the 3rd section of the 6 Geo. 4, c. 16, which provides that if any trader shall make any fraudulent grant or conveyance of any of his lands, tenements, *goods, or chattels*, or make any fraudulent gift, delivery, or transfer, of any of his goods or chattels, every such trader doing, &c., any of those acts, deeds, or matters, with intent to defraud or delay *his creditors*, shall be deemed to have thereby committed an act of bankruptcy (*Oswald v. Thompson*, *suprà*).

MISCELLANEA.

O'Brien's writ of error—Commission of judges—Copy of indictment and list of witnesses—Treason in Ireland—Allocutus.—The judgment of the Irish court has been affirmed in the House of Lords. There were four objections raised on behalf of the prisoner. 1. To the caption of the indictment, which recited a commission to three judges, by name, empowering them, "with others," to try the prisoners; only the three judges named, in fact, did try them, and it was urged that they had not authority for this purpose, especially in the absence of a quorum clause; but the House of Lords decided three judges had such authority; that the direction to them by name was sufficiently certain, and was not rendered uncertain by the part which followed as to others being joined with them. The second error assigned, and the most important in the opinion of the counsel, for the prisoner, was that he had not been furnished with a copy of the indictment and a list of witnesses ten days before the trial, according to the statute 57 Geo. 3, c. 6. This objection, which was raised with so much practical success in *Frost's case* (2 Mood. C. C. 140, 9 C. and P. 129), was now held untenable, as the statute does not apply to treason committed in Ireland. A question naturally arises connected with this part of the case, whether, if such a privilege be required by persons accused of treason in England, it should not be extended by statute to those who are accused of a similar offence in Ireland. The view entertained by the House of Lords with regard to this objection rendered it unnecessary for them to decide whether it should have been raised by plea or by motion to the court. In *Frost's case* it was decided that it was too late to

take the objection after plea pleaded, and that, if taken in due time, its only effect would be a postponement of the trial, in order to give time for a proper delivery of the list and copy. The third error assigned was, that to levy war against the Queen in Ireland was not to do so within "this realm," according to the stat. 25 Edw. 3 (on which it was contended the sixth count was founded); but that statute was held to have been extended to Ireland by Poyning's Act. Fourthly, it was urged that the "*allocutus*" was defective, as the prisoner was asked what he had to say why "judgment" should not be passed upon him, whereas it was contended that he should have been asked why "judgment of death" should not be passed upon him; but this was held to be sufficient, as by "judgment" was intended the sentence allotted by law to the offence.

Costs of sheriff's interpleader in England and in Ireland.—The uniform practice of the English courts has in all cases been to refuse the sheriff the costs of obtaining the interpleader rule, under the 1 & 2 Will. 4, c. 58, Eng. In *Bryant v. Ikey* (1 Dow. P. C. 430), the counsel for the sheriff contended that the class of cases in which the court had been accustomed to refuse the sheriff his costs were those in which there appeared to be a *bond fide* execution on the one side, and a *bond fide* claim upon the other; that the execution creditor, by his non-appearance having admitted himself in error and abandoned his rights, and having improperly forced the sheriff into court, was entitled to his costs. But the Court said that if the sheriff were to be allowed his costs in cases where either the claimant or execution creditor failed to appear, both would appear to save the expense of those costs; that the judges had therefore thought it better to draw one strict line, and in no case to allow costs to the sheriff. This practice, though adopted in the earlier cases under the similar act for Ireland (9 & 10 Vic. c. 64), in *Ball v. Bruen* (Bl. D. & O.), and in a recent case in the Common Pleas, *Alexander v. Handy* (11 Ir. L. Rep. 330), has not been unanimously approved of in this country, and has been expressly overruled by the Court of Exchequer in the cases of *Scully v. Figges* (1 Ir. Jur. 63 Ex.); *Luscombe v. Blake* (*ibid*). The ground upon which the English courts have founded their practice is, that the act confers a large benefit upon the sheriff, by relieving him from a liability he would be otherwise subject to. No question turns upon the construction of these acts, the allowance of costs being in every case entirely in the discretion of the court. We think the practice adopted by the Court of Exchequer in this country is certainly more just than that of the English courts, and is that which is adopted in interpleader suits in equity, *Pous v. Gilham* (Coop. 56), *Aldridge v. Mesner* (6 Ves. 417), in which the plaintiff is entitled to his costs from the fund in the first instance; and though a sheriff cannot proceed for relief in a

court of equity (*Kingsley v. Bolton*, 1 V. and B. 335), it is not easy to understand on what principle he is to be put to expense because the Legislature had lightened a liability incurred in the discharge of his duty—the principle on which courts of equity invariably give ordinary persons their costs appearing to be equally applicable to the case of sheriffs (1 Irish Jur. 235).

Exemption from tithes.—The notorious case of *Salkeld v. Johnson* has been before the Exchequer (18 Law Journ., N. S., Exch. 89), which court decided against the claim for tithes. The case turns upon the 2 & 3 Will. 4, c. 100, for “shortening the time required in claims of *modus decimandi* or exemption from or discharge of tithes.” The statute applies to a *modus*, a composition real, and an exemption from and discharge of tithes. It will be necessary to bear in mind the previous law in order to understand the bearing of the new enactments. At the time of the statute passing a *modus* could be established by proof of its constant and unvarying payment from the time of legal memory; a composition real by proof of its existence by deed before 13 Eliz.; but an entire exemption from the payment of tithe by laymen could not be established by the simple proof of the non-payment of tithes for any period, as proof must also have been given of the legal origin thereof—that is, that the lands had belonged to one of the greater religious houses dissolved by Henry VIII., and had been holden by such house from time immemorial discharged from payment of tithes. Mere non-payment was no ground of exemption for the laity, “*modus de non decimando in laicis non valet* ;” and, therefore, their defence to a suit for tithes consisted of two parts—first, title; secondly, time—and the course in practice was, first, to prove that the lands were abbey-lands at the period of the dissolution of monasteries; and, secondly, that from time immemorial they had been exempt from tithe. This latter branch of the case was proved *prima facie* by evidence of modern user or enjoyment of the lands without payment of tithe; but the presumption arising therefrom, or from proof extending back for centuries, might be rebutted by production of a terrier, survey, valuation, or other document of more ancient date, showing that tithe had once been paid for such lands. Such was the state of the law when 2 & 3 Will. 4, c. 100, was passed. 13 Jur. pt. 2, pp. 161, 162.

Marriage with deceased wife's sister.—We before alluded to the Report of the Commissioners as to marriages with deceased wife's sister (pp. 102, 103), and we may now state that a bill is now before Parliament to carry out the views of the commissioners. A writer in the *Jurist* (v. 13, pt. 2, p. 155) says: “The bill provides that all marriages heretofore contracted within the degrees above mentioned shall be valid to all intents and purposes; and, after the passing of the act, all Protestant Dissenters who hold that such marriages are

not prohibited by Scripture, Catholics who shall have obtained an ecclesiastical dispensation, and Jews, who, according to the evidence of the Chief Rabbi (*vide* Rep. of Com. 152), not only hold that such marriages are not prohibited, but are distinctly understood to be permitted by the Levitical code, will be able to contract such marriages. The commissioners, in the report to her Majesty, on which the present bill is founded, state their opinion strongly that the stat. 5 & 6 Will. 4, c. 54, has failed in its object, and urge very strong moral reasons against the policy of the prohibition. And they add, 'The doubts which exist as to the validity of these marriages when celebrated abroad, under a variety of circumstances, add another evil consequence to those which we have enumerated.' In nearly all the continental states of Europe, Protestant as well as Roman Catholic, these marriages are, by dispensation or otherwise, permitted; and they are lawful and valid in the United States of America (*vide* Story's Conflict of Laws, c. 5, s. 115); and it seems obviously to be desirable to remove the statutory prohibitions which are found to create such confusion and evil, and to leave each case as a matter of ecclesiastical discipline to each church and religious community, to be dealt with according to their interpretation of the Scripture, or the canons of the Christian Church."

Voluntary agreement for meritorious consideration not enforced in equity—Ellis v. Nimmo.—We mentioned (p. 137) that Sir Edward Sugden had himself given up the doctrine of *Ellis v. Nimmo* in deference to the prevailing opinion of the profession, which was and is that a voluntary agreement or settlement in favour of a child or wife after marriage will not be enforced. However, a writer in the *Jurist* has undertaken to show that the doctrine of *Ellis v. Nimmo* is correct, and is even supported by previous authorities. As the point is one of some importance and interest, we here give an extract or two from this article:—"The question whether a meritorious consideration is sufficient to support an imperfect gift or an assignment of an expectancy appears to be the subject of conflicting decision. The question came before Sir E. Sugden, L. C., in *Ellis v. Nimmo* (L. and G. 333), and that learned judge held that an agreement by a father, entered into after his daughter's marriage, to make a provision for her, would be carried into effect in equity. In his judgment he refers to several cases in which the court had intimated that a contract entered into upon a meritorious consideration, meaning thereby a contract in favour of a wife or child, would be enforced (*Colman v. Sarrel*, 1 Ves. Jun. 50; *Pulvertoft v. Pulvertoft*, 18 Vcs. 84). Singularly enough, the case of *Wright v. Wright* (1 Ves. sen. 409), in which the point had arisen of an assignment of a possibility being enforced in equity, was not referred to in *Ellis v. Nimmo*; neither was it noticed in *Holloway v. Headington* (8 Sim. 324), which will

be presently referred to." The case of *Wright v. Wright* was an assignment of a possibility by a father to his youngest son in consideration of natural love. The Lord Chancellor said that that consideration was not for some purposes (as against creditors) so strong as money, "but as against any claiming voluntarily from the father, as executor, administrator, or heir at law, it *is* a consideration, and only made so in a second degree, where the question is with a creditor who is a purchaser," and, as might have been added, or where the question is with a purchaser for *valuable* consideration, though not a creditor. It is to be observed that in this case the younger son was not applying to equity, but the eldest son was seeking to enforce his claim by paying the sum which was to convert the possibility into an estate. However, the writer continues: "*Dillon v. Coppin* (4 My. and Cr. 645), which it was contended, in *Whitby v. Mangles* (10 Cl. and Fin. 215), overrules *Ellis v. Nimmo*, was a case of a totally different kind, having, as it seems to us, nothing to do with the doctrine of *Ellis v. Nimmo*. *Dillon v. Coppin* was the case of a deed poll by a father in favour of his daughter, professing to assign certain property, viz., East India Stock, which was incapable of passing by assignment. It was kept by the father during his life in his own possession; and the daughter never knew of its existence. This case was expressly decided on the authority of *Antrobus v. Smith* (12 Ves. 39); and it is impossible not to see that a principal ingredient in the decision was the retention of the deed by the father. The Lord Chancellor expressly distinguished the case from one of contract. "Here," he said, "is no contract, but a deed poll, professing to assign property incapable of passing by such assignment." The case of *Holloway v. Headington* (8 Sim. 324) does not overrule, or affect to overrule, the case of *Ellis v. Nimmo*. In that case the settlement made after marriage by husband and wife was in favour of the wife for life, remainder to the husband for life, remainder to the children of the wife living at her death, to be begotten by her then present or any future husband. As regarded the wife's interest, therefore—and the bill was by her to have the trusts carried into execution—the settlement was purely voluntary, the love and affection for a wife clearly not constituting even a meritorious consideration. The children of the wife by any other marriage were also clearly mere volunteers, being strangers in blood to the husband, the real settlor, and the only parties on whose behalf a meritorious consideration could be set up were the children, who were contingently interested only, and who, whether they could or not have sued, did not sue. Framed, therefore, as the suit was, the bill could only be dismissed. What the court said was, that *Ellis v. Nimmo* was not binding, because the grounds on which Sir E. Sugden had decided it were disapproved by his successor,

although the decree was affirmed; and then the Vice-Chancellor goes on to say that *Ellis v. Nimmo* was wholly unlike the case before him, and to point out in what the two cases differed; so that the authority of *Ellis v. Nimmo*, whatever it may be, is not touched by the decision in *Holloway v. Headington*. If, then, *Ellis v. Nimmo* is not overruled by either *Dillon v. Coppin*, *Holloway v. Headington*, or *Meek v. Kettlewell*, there is still reason to consider it as by no means clear, having regard to the case of *Wright v. Wright* above cited, that a contract to assign a possibility, or any other contract resting *in fieri*, will not be executed in equity in favour of a child, or perhaps a brother or sister."

Restraint upon alienation—Proviso against alienation construed as a limitation.—Although a condition not to alien attached to an estate is void, the same end may be attained by a limitation over on the event of alienation; and the legality of this limitation is so thoroughly established, that courts of equity will construe a proviso against alienation, with a gift over on that event as *equivalent to a limitation* to one until he alien, and in that case a limitation over (*Dommett v. Bedford*, 6 Term Rep. 684; *Shee v. Hale*, 13 Ves. 404; *Wilkinson v. Wilkinson*, 3 Swanst. 515; *Yarnold v. Moorhouse*, 1 R. and M. 364; *Lewes v. Lewes*, 6 Sim. 304; *Brandon v. Aston*, 2 You. and Coll. C. C. 24; *Kearsley v. Woodcock*, 3 Hare, 185); and this construction is made whether the proviso in this form be contained in a will or settlement (*Lord v. Bunn*, 2 You. and Coll. C. C. 98). To take one of the preceding cases as an illustration of this latitude of construction: In *Wilkinson v. Wilkinson* (*ubi sup.*) the limitation was by will of freehold and leasehold estates to trustees and their heirs, &c., upon trust, subject to certain annuities, for T. H. W. for life, with remainder over, and the will contained a proviso that the estate so given was upon the express condition that, in case T. H. W. should assign, dispose of, or otherwise charge his life estate, so as not to be entitled to the profit, receipt, use, and enjoyment thereof, then and thenceforth that estate should devolve upon the person next entitled thereto, as mentioned in the will. T. H. W. became bankrupt, and the limitation over, it was decided, took effect upon his bankruptcy. Sir Thomas Plumer, in giving judgment, is reported to say, "With respect to the validity of a proviso, it is clear that a testator may thus modify the estate he gives; for though, in a case which has been mentioned (*Brandon v. Robinson*, 18 Ves. 429), it is stated, as the opinion of a very great judge, that if an estate is given for life, the incidents to a life estate cannot be taken away; and though it is better, therefore, when such a limitation is intended, to give the estate *until* bankruptcy or alienation, and not first to give it for life, and then to prohibit the attempt to alien, yet this is answered by considering that, in a will, any con-

dation or modification may be annexed which does not offend against any rule of law; and it is immaterial by what form of words the intention is executed, whether by a devise until the devisee shall have charged or incumbered it, or by proviso with a limitation over upon such an event. Each mode is equally valid, and of the same effect" (13 Jur. pt. 2, p. 206).

COVENANTS IN CONVEYANCES TO USES.

Though the statute of uses executes the possession to the use—in other words, transfers the seisin of the grantee to uses to the *cestui que use*, whereby the *cestui que use* becomes seized of the legal estate—yet the fact that the grantee to uses takes some estate at the common law is still taken notice of by the rules of the common law for some very important purposes. The seisin to the grantee to uses is considered as different from that taken by the *cestui que use*; and this is especially important in the case of covenants in deeds having limitations of uses with reference to their running or not with the land.

To place this important subject in a clear light, several different cases or propositions will be put by way of exemplifying the differences. It is to be supposed in each case that the covenant is such as would run with the land in an ordinary common law deed. It must be borne in mind that the releasee to uses is considered to have a common law title, which enables him to be made a depositary of a covenant, and the *cestui que use* is considered to be the assignee of this covenant, and that, therefore, where a covenant running with the land is so entered into with the releasee to uses, the *cestui que use* may have the benefit of it. In other words, the general rule is, that the *cestui que use* is considered to be the assignee of the land, and that, though he takes under the statute of uses the whole title of the grantee to uses, he is the assignee of that grantee, and comes within the benefit of a covenant running with the land. (As to the burden of the covenant, see cases or propositions, Nos. 7 and 17.)

The following are the propositions, it being supposed that in each we are speaking of a common law conveyance passing a common law seisin, except where otherwise expressed.

1st. Conveyance to A. and his heirs to the use of B. and his heirs; with whom should the covenants by the grantor be entered into? The covenants may be entered into either with A. or with B., as they will run with the land in either case; for, as to covenants

with A. and his heirs, B. will take the full benefit of them under the statute of uses, and so will his heirs and assigns. If the covenants are with B., then the succeeding owners of the land will take the benefit, because they take the very estate (2 Sugd. Vend. and Purch. 460).

2ndly. Conveyance to A. and his heirs to the use of B. for life, remainder to the use of C. in fee. If the covenants are with B., the benefit of them will not pass to C., nor to his representatives or assigns; if with C., the benefit will not pass to B. nor to his assigns. The reason is, because there is no privity between B. and C., as each of them takes a different estate under the use.

3rdly. Conveyance to A. and his heirs to the use of B. for life, remainder to the use of C. in fee. This is the same case as the preceding, but let us suppose that the covenants are made with A. and his heirs. In this case the benefit of the covenant will pass to B. for his life, and to C. according to his remainder in fee expectant on B.'s death. The principle is the same as in the 1st case, where, the covenant being with A., B. would have the benefit of it.

4thly. Conveyance to A. and his heirs, to such uses as B. shall appoint, and, in default of and until appointment, to the use of B. in fee. If the covenants are made with B., and he executes his power of appointment, the benefit of the covenants will not pass to the appointees, nor to their heirs or other subsequent common law appointees, nor to any subsequent owner of the land. This depends upon the principle that, when B. makes his appointment, the party taking by virtue of it takes, neither by the common law nor by the statute of uses, the estate of B., but takes under the uses which B. had the power to direct, which uses take effect out of A.'s seisin. In order that the covenants with B. should enure to the benefit of his appointee, it must appear that he has the same estate as B. had. That estate the appointee cannot have, for the exercise of the appointment passes no estate that was in B., and consequently the benefit of the covenants cannot pass to such appointee. But suppose that B. does not exercise his power, and, instead, grants and releases; in this case there is a transmission of a legal common law estate in B., and the purchaser takes the same estate which B. had in default of appointment. In this case, as the ownership is derived under B.'s seisin in fee, the covenants will run with the land to B., his grantee, representatives, and assigns. From this case we may see that, according as the party does or does not appoint, the covenants will or will not run with the land. It is, therefore, improper to make the covenants with any one but the grantee to uses.

5thly. Let us take the same case as the preceding, only supposing that the covenants are entered into with A. and his heirs. If B. appoints, the appointee takes a use deriving its effect out of A.'s

seisin; so, whether there is an appointment by B., or a conveyance not creating any new use, but passing the existing estate, in each of these cases the purchaser takes the use limited under A.'s seisin, and the appointee and grantee alike come within the description of assignees of A., for, whether taking a statute use or a legal estate, he is an assignee under the legal title of grantee to uses.

In such cases as the 4th and 5th the covenants should be invariably entered into with the grantee to uses, for though the statute of uses passes the corporal possession to the *cestui que use*, yet not so but that the common law still takes notice that the grantee to uses had the legal estate.

6thly. Conveyance to A. and his heirs to the use of B. and his heirs, and covenant by B. This covenant runs with the land against the heirs of B. and against his assignees, the assignees of his heirs, and against all subsequent owners of the land.

7thly. But suppose that in the preceding case the covenant were by A. for himself and his heirs. There is some difference of opinion in the profession. Some say that the covenant by A. will be effectual to bind B. and his assignees and representatives. Others say the contrary, because between the case of a covenant *with* releasee to uses, and *by* him there is an essential distinction; the benefit of a covenant *with* him passes from him to the *cestui que use* as assignee by virtue of the statutable alteration; but in the case of a covenant *by* him there is no estate abiding in him which he could charge with a covenant as a burthen, for B. takes under the statute of uses immediately without any lapse of time. There is no express authority upon the point, and in practice it is not usual for the releasee to enter into covenants. It should seem that the better opinion is that the covenant by A. would *not* charge B. (see Jarman and Bythewood's *Convey.* by Sweet, p. 346, *et seq.*, 3rd edit.).

8thly. Conveyance to A. and his heirs to such uses as B. shall appoint, and in default of appointment to the use of B. for life, with remainder to the use of C. in fee. There is no difference in principle between this case and that in No. 7. The covenant *by A.* would not bind the appointees of B., nor B. for his life, nor C. in fee.

9thly. Conveyance to A. and his heirs to such uses as B. shall appoint, and in default of appointment to the use of B. in fee. Suppose the covenant to be *by B.* This will be the same case as No. 4, except that that is *with B.*, whilst this is *by B.* The same distinction is to be taken as there noticed as to the effect of a covenant in favour of B., according as it is or not an appointment. If B. appoint under his power, the parties who take by virtue of that appointment will not be bound by B.'s covenant. If B. make a conveyance by grant, feoffment, &c., the grantee, feoffee, &c., will be bound by the burden of that covenant. The reason of the distinction is that where

B. appoints, the appointee takes an estate which in no wise was B.'s estate, for the effect of the appointment is to pass over B. altogether. B.'s covenant cannot charge the appointee more than that of a mere stranger could do. Where, indeed, B. deals with the estate in default of appointment, i. e., where he conveys it, it is his estate which passes, and consequently his covenant charges that estate in the hands of subsequent owners.

10thly. Appointment by A. under a power to the use of B. and his heirs, and covenant by B. with A. This covenant will bind all subsequent owners as assignees of B., though entered into with a person who had a power merely, and who might have no estate in default of appointment, and who consequently, as regards B., would be a mere stranger after the execution of the appointment. B. would take as the donee of a use. He would not claim under A.'s estate, but B. would nevertheless take a fee simple, and charged with covenants running with the land, though the party with whom it was made might not have any estate in the land. It is immaterial in considering the question whether a covenant runs with the land as against representatives and assignees whether the conveyance were made by an appointment or by a common law conveyance. It is assumed that there is some case in which the grantee of the land may charge the land, so that the covenant may run against a subsequent owner; this is presumed, for it is not yet settled; but supposing that it is ultimately determined that the covenant may run with the land, the effect of the conveyance being by appointment will be unimportant.

11. Appointment under power to B. in fee, and covenant by the appointor with B. The covenant will run with the land in favour of B.'s heirs and assignees. The fact that the party covenanting had no estate in default of appointment, which he himself could charge with his covenant, does not prevent the covenant running with the land as to a purchaser's assignee. Suppose that the covenant is that a rent-charge shall be charged on certain land—say X. and Y. Then A. appoints Y. to B. in fee, and A. covenants that X., which he retains, shall exclusively bear the burden of the rent-charge. As far as regards the appointee, the covenant runs with the land in favour of B., his heirs and assigns. So the benefit of the ordinary covenants for title in an appointment and release, if the conveyance is of the fee simple, and not merely under power, passes to claimants subsequent to the appointee.

It will be noticed that in this case the party executing the power is a stranger to the estate, as the appointment takes effect under some previous instrument. The appointee, of course, takes under that original instrument. The appointor, too, is a stranger to the covenantor's estate, but this is immaterial, as it is not necessary that there should be a connexion of title between the covenantor and the

covenantee. The covenant in this case runs with the land. It should be remembered, however, that some writers maintain that there should be a privity of estate, but this is wrong. Privity of estate as to covenants running with land is quite immaterial. We may observe that in the case here supposed, though the covenant is by a party who may be a stranger to the estate, yet he is not necessarily so, for he may have had an estate limited to him in default of appointment. See, on this subject, *Smith's Leading Cases*, note to *Spencer's Case*; 2 *Sugd. Vend. and Purch.* 462, 10th edit.; 9 *Byth. Convey.* 363, 3rd edit., by Sweet.

12. But suppose an appointment under a power to be to such uses as B. shall appoint, and, in default of appointment, to B. and his heirs, and that the covenants by the appointor are with B. and his heirs. If B. afterwards makes an appointment, this covenant of the appointor in favour of B. will not enure for the benefit of the appointee of B., but if B. makes a conveyance by virtue of his estate in default of appointment, the covenant will pass just as in the case of No. 11 (and see Nos. 4 and 9). It will be seen that in this case the benefit of the covenant will pass or not according as B. appoints or not.

13. Therefore, in such a case as the above, the appointment should be varied, and made to A. and his heirs to such uses as B. shall appoint; in this case the covenant might be with A., who takes the legal fee simple. The use which B. would have under the power to appoint would be a mere trust, and there would not be a divesting of the common law seisin by the use. However, it is to be remarked that the appointee would not have the benefit of the covenant at law, though he would in equity. If A. made a conveyance, the benefit of the covenants would pass.

When a conveyance is made under a power, there are only two ways of effectually creating covenants which will run with the land—1. Either omit to create any power of appointment under the uses which are limited; thus, on a purchase, A., the vendor, entitled under the ordinary limitations of a purchase conveyance, should first appoint to himself in fee, and then convey to a purchaser. Or, 2. The appointment may be left out altogether, and let the vendor convey by virtue of his estate, i. e., grant or release; for in such case the grantee will not be in by the use, but will take the common law seisin. A third way is to make the appointment to some one and his heirs to such uses, &c., in which case the subsequent uses will be mere trusts.

Where there is a conveyance under a power there cannot be a power created by the deed so as to pass the covenants, if that party executes the power, for the appointee will take under the original power.

The appointment should be left out, and the party make a conveyance in respect of his estate.

14. Appointment under power and covenant *by* appointor. The burthen of the covenants runs with the land if the appointor afterwards conveys the land which he retains by appointment, because the appointee from him will take not his estate, but the estate created to serve uses under which his power arose. If he do not execute the power, but conveys under the limitation in default of appointment, the grantee and all owners of the estate will be bound by the covenant. The question arises thus: covenant for charge of a rent-charge upon one of two parts of an estate. In order that the covenant may run with the land, the appointee must make an appointment to his own use in fee to get rid of the appointment, so that he may have an estate which cannot be disturbed.

Suppose A. possesses two estates (which he acquired under one instrument), called X. and Y., limited to the usual uses to bar dower, and that he sells one (Y.), and does not give up the title deeds, but covenants to produce the title deeds. In this case, A. having a power, the covenant may not be effectual, for, if he appoints X., the exercise of the power divests his estate without passing a seisin from him, which indeed passes from the party who created the power. The covenant is not, therefore, binding on the appointee, as he does not take his appointor's estate.

15. Conveyance by A. (seised of X. and Y.) to Z. to such uses as B. shall appoint, and in default of appointment to B. in fee. Supposing the covenant of A. to be with B., it will run with the land against the parties entitled to the part retained, i. e., against A.'s successors in title to the land which is *not* conveyed. So that if A. conveyed X. with a covenant to produce title deeds and retained Y., which he afterwards conveyed to C., C. would be liable on this covenant to ' as the *burden* of the covenant runs with the land.

16. The general rule is that every person who takes an estate by way of use from the owner of the land is entitled to the benefit of a covenant running with the land, the benefit of which that owner could have actively claimed. That is, the party taking the use is considered in all cases an assignee. In the case put in No. 4 we have said that, if B. conveys, the covenants will run with the land in favour of the subsequent grantees or owners. Suppose that B. bargains and sells, or covenants to stand seised, the bargainee or covenantee are assignees, though no seisin is actually conveyed, but the seisin is engrafted by the contract. Wherever the covenant would run with the land, every person who afterwards acquires the legal interest in virtue of which the covenant will run with the land, whether it be an assurance under a use or at common law, is an

assign, and is included in every proposition that a given covenant will run with the land.

17. As we have seen, where a conveyance is to A. and his heirs to the use of B. and his heirs, it is immaterial whether the covenants are entered into *with* the one or the other, but it is a question still undecided whether a covenant is effectual when entered into *by* the releasee to uses; that is, it is doubtful whether it will bind the *cestui que use*. On this point, as well as the preceding propositions, consult 9 Bythewood's Conveyancing, by Sweet, 346, *et seq.*; 2 Sugden's Vend. and Purch. 463, 464, 479, 10th edit.; pp. 709, *et seq.*, 11th edit.; Milnes v. Branch, 5 Mau. and Selw. 411; Randall v. Rigby, 4 Mees. and W. 135. Both these latter cases are opposed to the argument that the covenant *by* releasee will be effectual to bind *cestui que use*, but it is doubtful whether the court adverted to the point as the ground of their decision. Therefore it is prudent to consider that the covenant of releasee to uses will *not* bind his *cestui que use*.

NEW COUNTY COURTS.

Insolvency—Further examination of insolvent.—The question lately raised on several occasions as to the forum to which an application should be made for the further or re-examination of an insolvent heard on circuit prior to the 10 & 11 Vic. c. 102, which takes away the insolvent commissioner's circuit, and giving the jurisdiction to the new county court judges, has been at last decided by the Court of Queen's Bench. The result may be thus stated: By sec. 98 of stat. 1 & 2 Vic. c. 110. the assignee of an insolvent, whose discharge has been adjudicated under that act, may apply to the court of insolvent debtors in London, or a commissioner on his circuit, for a further examination of the insolvent. By stat. 10 & 11 Vic. c. 102, the circuits of insolvent commissioners are abolished, and jurisdiction, in cases of insolvency beyond twenty miles from London, is given to the judges of the county courts: Held, that application for the further examination of an insolvent, whose discharge had been adjudicated by an insolvent commissioner on circuit, under sec. 98 of stat. 1 & 2 Vic. c. 100, must be made to the Court of Insolvent Debtors in London.

Possession of premises—Premises out of jurisdiction.—It has been decided that, although the plaintiff and the defendant both reside within the jurisdiction of a county court, if property sought to be recovered under the 129th section be situate *without* the jurisdiction.

a warrant of possession cannot be executed, the 61st section, authorising service of process in another district, having no reference to cases under sec. 122 (*Ellis v. Peachey*, 18 Jan. 564). *Per Wightman, J.*: "I am of opinion that the rule for a prohibition must be made absolute. The 122nd section authorises the judge to issue a warrant to any bailiff of the court to give possession. A warrant under this section would have no force beyond the district of the court. With respect to warrants against the goods or the person, there is a power, by s. 104, to transmit them to the high bailiffs of other courts, but no such power is given with respect to warrants for possession of tenements."

Action by member of building society—Jurisdiction.—On a rule for a mandamus to the judge of a county court to hear a plaintiff brought by a member of a building society within the 6 & 7 Will. 4, c. 32, against an officer of that society, the 25th rule of the society directing a reference of all disputes to two justices of the peace pursuant to the statute Geo. 4, c. 56, s. 27, which is incorporated in the first mentioned statute: Held, that the right to bring an action was taken away, and that the 9 & 10 Vic. c. 95, s. 58, did not operate to revive a power of bringing actions in the county courts, which had been taken away from all courts generally (*ex parte Payne*, 5 D. and L. 679).

Jurisdiction—Pendency of another action in a superior court—Rescinding order and making fresh one—Debt with costs above £20.—Plaint in the county court for rent; defendant appeared and pleaded pendency of another action in the Court of Exchequer upon a promissory note, the consideration for giving which was the rent: Held, that as they were not for the same cause of action *eo nomine*, the jurisdiction of the county court was not ousted. The judge gave judgment for the plaintiff on the 15th February, 1848, ordering payment to be made within a week after the decision of the cause in the superior court. The plaintiff afterwards came before him, in the absence of the defendant, and showed that the action in the superior court had been discontinued, whereupon the judge granted a summons under the 98th section, calling upon the defendant to show cause why he should not pay the amount; "the particulars of debt or claim" being "judgment of this court, 15th February, 1848, for £20 debt, and £2 10s. 8d. costs." The defendant appeared, and the judge rescinded his former order, and made an order for payment by instalments. The defendant was served with a copy of the judgment, drawn up upon this order, in the form No. 24 in the schedule of forms framed by the judges, in which it was ordered "that the said plaintiff do recover against the said defendant the sum of £22 7s. 4d. for debt, and £1 10s. 2d. for costs:" Held, on motion for a prohibition, that the latter summons was not in the nature of a fresh plaint; that the judge had jurisdiction to make the latter order,

although for more than £20; and that the insertion of the word "debt" in the judgment as drawn up did not show an excess of jurisdiction (*Byrne v Knipe*, 5 D. and L. 659; and 18 Law J., Q.B., N.S., 33).

County Court Amendment Act.—This bill has been much discussed, and several of the clauses withdrawn. The other clauses will probably be adopted with some amendments.

NOTES OF RECENT LEADING CASES.

COMMON LAW.

BILL OF EXCHANGE.—*Notice of dishonour—Presentment to drawer being executor of acceptor*—[*Caunt v. Thompson*, 13 Jur. 495].—Though no precise form of words is necessary to be used in giving notice of dishonour of a bill of exchange, yet an intimation should be given in the notice that payment has been refused by the acceptor. However, as will be seen by the following case, a presentation to a drawer who has become the legal representative of the acceptor will be sufficient without any further notice, he having in fact sufficient notice of the dishonour from the mere dishonour by himself. There the acceptor of the bill died before it became due, having appointed as his executor the drawer of the bill, who accordingly proved the will. The bill, when due, was presented by the holder for payment to the drawer at the house of the deceased acceptor, when the drawer said that he was the executor, and that, as the acceptor was dead, the bill must stand over for a few days. It was held that this was sufficient notice to the drawer of the dishonour of the bill (*Caunt v. Thompson*, 13 Jur. 495). *Per* Cresswell, J.: "In *Hartley v. Case* (4 B. and C. 339), Abbott, C.J., says, 'There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange; but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor.' Since that case was decided there has been some fluctuation of opinion upon the subject. In *Solarte v. Palmer*, which was finally decided in the House of Lords, and reported in 8 Bligh, N.S., 874, and 1 Bing. N. C., 194, a strict rule was adopted, but that has not been adhered to. In *Burgh v. Legge* (5 Mee. and W. 418), Parke, B., says, 'There must be proof of a notice given from some party entitled to call for payment of the bill, and conveying in its terms intelligence of the presentment, dishonour, and parties to be held liable in consequence.' But in *Furze v. Sharwood* (2 Q. B. Rep. 388), and *King v.*

Bickley (2 Q. B. Rep. 419), it was decided that the notice need not in terms inform the party to whom it was given that he is looked on for payment. In *Miers v. Brown* (11 Mee. and W. 372) then decisions were followed. This rule does not differ in substance from that held by Ashurst, J., in *Tindal v. Brown* (1 T. R. 167). He says, 'Notice means something more than knowledge, because it is competent to the holder to give credit to the maker. [That action was on a promissory note.] It is not enough to say that the maker does not intend to pay, but that he, the holder, does not intend to give credit.' In substance, these cases appear to establish that, to make a prior holder responsible, he must have his information from some party entitled to call for payment; he must be informed that the bill has been dishonoured, and that the party is in a condition to sue him for payment, from which he may infer that he will be held responsible. In *Miers v. Brown*, Alderson, B., describes what is needful thus: 'Knowledge of the dishonour obtained from a communication by the holder of the bill amounts to notice.' In the present case the defendant knew the bill was dishonoured, and he knew from the best source, namely, his own personal act, that it was dishonoured, and had been presented by the drawer; and he knew from the same source that time had not been given to the acceptor. He, therefore, had all the information which, according to Mr. Justice Ashurst, the notice ought to give; and, knowing that, the defendant knew that the holder had placed himself in a position to call upon him, the drawer, for payment, from which it appears, by the modern decisions, he might infer that he would be called upon. This is very different from that knowledge which is spoken of as not equivalent to notice, and is as much notice as the knowledge spoken of by Alderson, B., in *Miers v. Brown*. Indeed, there is some absurdity in requiring the plaintiff to state to the defendant at the time he dishonoured the bill, 'Take notice, this bill has been dishonoured by you.'"

COVENANT.—*Absolute or conditional covenant to pay out of fund*—[*Bain v. Kirk*, 13 Jur. 559].—This case is only important as showing the great nicety required in framing a conditional covenant for payment of money, so as that it may not be construed to be an absolute covenant. By a deed which recited that the defendant was executor of the will of J. B., deceased, and that the plaintiff and his brothers were entitled each to a legacy of £3,000, and that the assets were insufficient to satisfy the legacies, and that the plaintiff had lately entered into a trading partnership, and had thereupon undertaken to pay two sums of money, on the 15th March and on the 15th December, and that the plaintiff and his mother had requested the defendant to advance the plaintiff those sums, out of the estate, before those days; the defendant covenanted that he would,

on or before those days, pay to the plaintiff, "by and out of the assets of J. B., deceased," the sums required, and the plaintiff, in consideration thereof, agreed that he would, on the 1st November, execute a release and indemnity to the defendant in respect of all matters connected with the will of J. B., and that, in case the plaintiff's share of and in the assets of J. B., should not amount to the sum to be advanced, the plaintiff would pay the defendant the difference, and indemnify him against all loss, &c., and against all actions by other legatees, by reason of the payment to him; and the plaintiff's mother, upon the same consideration, agreed to release to the defendant the payment of part of an annuity due to her under the will: Held, that, notwithstanding the words "by and out of the assets," &c., the covenant of the defendant was absolute, and not contingent upon the existence of assets at the days appointed for the payment of the moneys (*Bain v. Kirk*, 13 Jur. 559).

INSURANCE.—*What is an insurable interest—Profits of freight*—[*McSwiney v. Royal Exchange Assurance Co.*, 13 Jur. 489].—The subjects of marine insurance are ship-goods, merchandise, freight, bottomry, and respondentia interest; a special interest in goods, as a lien of a factor; the profits expected to arise from a cargo. But a mere expectation without any interest is not insurable (*Selw. N. P.* 957, 958, 11th edit.; 2 Steph. Com. 117, 2nd edit.). In an insurance on freight an inchoate right to the freight must be commenced. The difficulty is to fix on this period in each case. In some cases it has been said not to attach until the goods are actually on board, and in others so soon as there is an actual contract for shipping them (see *Park on Insur.* 563, last edit.). Both the above subjects were discussed in *McSwiney v. Royal Exchange Assurance Co.* (*suprà*). There it appeared that the plaintiff, having entered into a binding contract for the purchase of 6000 bags of rice, to arrive by the ship *Edward Bilton*, from Madras, to be delivered in London in May, at 19s. per cwt., to be paid on the weight being ascertained, and into another binding contract, to sell 6000 bags of rice, *ex Edward Bilton*, to be delivered in May, at 20s. 6d. per cwt., payment as before, entered into a policy of insurance, "at and from Madras" to London, "on profits on rice," loaden or to be loaden on board the *Edward Bilton*, beginning the adventure upon the said goods from and immediately following the loading thereof on board the said ship at Madras. When the ship was at Madras, ready, according to her charterparty, to receive the 6000 bags on board, which were lying ready to be shipped, and when she had only taken 1200 bags on board she was blown out to sea, and so damaged as not to be able to bring any of the rice to England: Held, that the plaintiff had a good insurable interest in the profit, which, under the terms of the second contract, he was certain to make, if the ship and

rice arrived safe in England in May, and that he might insure that interest under the name of profits. Held, also, that the risk attached when the ship was at Madras ready to receive the cargo, and when the cargo was at Madras ready to be loaded on board, under the stipulations of a binding contract (*McSwiney v. Royal Exchange Assurance Co.*, 13 Jur. 489). *Per* Lord Denman: "Since the case of *Lucena v. Craufurd*, in error (2 N. R. 209, 315), there is no doubt that there may be an insurance upon profits; but it was contended, on the part of the defendants, that, to give an insurable interest, the goods out of which the profits were to arise must have been on board the ship, and that this case was within the principle of the decisions in *Stockdale v. Dunlop* (6 Mee. and W. 224) and *Knox v. Wood* (1 Camp. 542). Both those cases are, however, clearly distinguishable from the present. In *Stockdale v. Dunlop* there was no binding contract for the sale to the plaintiffs of the goods from which the profits were to arise; they had, as observed by the court, no legal interest whatever in the subject-matter of the insurance; there was merely an expectation of possession on the part of the plaintiffs, founded on a verbal promise of the vendors, which was not binding upon them, and therefore there was no insurable interest. In the present case the plaintiff had purchased the rice by a valid and binding contract, and the profit was fixed and ascertained by another valid and binding contract, entered into by him with his vendee. In the case of *Knox v. Wood* the vessel was lost upon her outward voyage, and no cargo was ready for her homeward voyage, upon which the profits were to arise, or even contracted for, so that, as Lord Ellenborough observed, the interest of the assured was the expectation of an expectation, which was not an insurable interest. In the present case the ship was actually at Madras, where the goods were lying ready to be put on board, in pursuance of a valid contract, and part actually was on board at the time of the loss. It appears to us that the case, in principle, falls within those of *Devaux v. l'Anson* (5 Bing. N. C. 519), *Miller v. Wane* (4 B. & C. 538), and *Flint v. Le Mesurier* (Park on Insurance, p. 563, last edit.), and that where there is a legal certainty, that profit will be made if goods arrive, and that the goods are ready to be shipped under a valid contract, there is an insurable interest; and that, if the loss arises from a peril insured against, such as the perils of the sea, the underwriters are responsible. The risk of loss of profits attached, when the vessel was at Madras, ready to take in her cargo, and had actually begun to take it in, and the loss occurred by the ship being blown off, and sustaining too much damage to take in all the cargo, which was a peril of the sea."

SLANDER.—*Respecting a man in his profession—Clergyman*—[*Pemberton v. Colts*, 10 Q. B. Rep. 461; S. C. 16 Law J., 115., Q. B. 403 B.; 11 Jur. 1011].—It is said by C. J. De Grey (*Onslow v.*

Horne, 3 Wils. 186) that words are actionable when spoken of persons touching their respective professions, trades, and business, which do or may probably lead to their damage. But in all actions for words of this kind it must appear from the words themselves, or from the pleadings, that at the time of publishing the words there was a *colloquium* concerning the profession or trade of the person of whom they were published (7 Bac. Abr. tit. "Slander," p. 269, 7th edit.; 2 Sessd. 307). These observations receive illustration from the following case, which was an action of case for a slander of a clergyman. 1st count, stating words spoken of plaintiff in his profession as follows (with innuendoes, and an inducement, stating only that plaintiff was vicar of a church, and defendant a clergyman, and that plaintiff had always conducted himself well in his profession):—"The very day I came into residence, Dr. P. [plaintiff] sent for me. I went and dined with him, and the wine must have been drugged, for I took but two glasses and was quite stupefied. While in this condition, Dr. P. put a bill into my hands, and requested me to sign it, saying, 'I wish to have it as a security for the payment of £130 per annum for reading for you at the new church.' I answered, 'Well, give me a pen and I will sign it.' Immediately I had signed it Dr. P. snatched it up, and, laughing, said 'This will be quite safe.' The bill, I think, was drawn for £2500 or £2600, but, having been stupefied with wine, I do not rightly remember." "You cannot suppose that I can visit a man who so cheated me at my first coming." Innuendo, that plaintiff fraudulently obtained the bill from defendant while he was stupefied with drugged wine. 2nd count, stating words spoken of plaintiff in his profession (with innuendoes, but no further material inducement) as follows:—"Dr. P. placed before me a bill I signed. I do not know for what amount it was, whether for £2000 or 3000, for I was completely pigeoned by Dr. P." Innuendo, that plaintiff had obtained the bill from defendant by fraud. Special damage, that plaintiff's curate believed him guilty of the misconduct, and by reason thereof was prevented from cordially and effectually assisting plaintiff in the clerical duties and spiritual concerns of the parish. On motion in arrest of judgment after verdict for plaintiff: Held, that the first count was good, because the words there set forth reflected upon the plaintiff in his profession; that the 2nd count was bad, because the words there did not so reflect. *Venire de novo* awarded (*Pemberton v. Colls*, 10 Q.B. 461).

SLANDER.—*Privileged communications* [*Kershaw v. Bailey*, 1 Exch. Rep. 743; S. C. 17 Law Journ., N.S., Exch. 129].—In an action for a libel or slander, the defendant is allowed to show that he made the communication or spoke the words under circumstances which make it a privileged communication. "Communications,"

says Mr. Baron Parke, in *Toogood v. Spyring* (1 Crompt. Mees. and Ros. 181), "fairly warranted by any reasonable occasion or exigency, and honestly made, are protected for the common convenience and welfare of society; and the law has not restrained the right to make them within any narrow limits." There are three classes of cases (omitting criticisms on works and on public characters) of privileged communications: 1. Where the party has made the communication in the conduct of his own affairs, in matters where his interest is concerned; 2. Where there is any public duty, legal or moral, requiring such communication to be made; 3. Where there is any private duty, legal or moral, requiring in like manner the party to communicate. In each case the communication must be made with an honest belief in its truth, and without actual malice. The case of *Kershaw v. Bailey* was determined on these principles. Under stat. 5 & 6 Vic. c. 109, the vestry, on precept from the justices, are to make out and return a certain number of persons within the parish qualified and liable to serve as constables; the list is to be affixed on the church door, and notice given when and where objections will be heard by the justices, who are empowered, at a special sessions, to strike out of the list the names of persons not qualified or liable to serve. At a vestry held in pursuance of that act, the plaintiff's name was inserted in the list of persons qualified and liable to serve, and he attended a sessions for the purpose of being sworn in, when the defendant, a parishioner, objected to him, and made a statement to the justices, in the presence of other persons, imputing perjury to the plaintiff. In an action for slander the jury found that the defendant made the statement *bond fide*, believing it to be true: Held, that the statement was properly made before the justices, and was a privileged communication (*Kershaw v. Bailey*, 1 Exch. 743).

COPYRIGHT.—*Songs—Assignment, attestation*—8 Anne, c. 18, s. 1—[*Davidson v. Bohn*, 18 Law Journ., N.S. (C. P.) 14].—An assignment of the copyright of a song under 8 Anne, c. 18, s. 1, in order to entitle the assignee to maintain an action for a piracy, must be by an instrument in writing attested by two witnesses (*Davidson v. Bohn*, 18 Law Journ., N. S., C. P. 14).

EQUITY.

EXECUTORS.—*Carrying on trade, authority to do so—Liability of representatives of executors for losses, &c.*—[*Kirkman v. Booth*, 13 Jur. 525].—We have already (*ante*, pp. 157, 158) stated this case from the Law Journal, but its importance will justify its repetition in an improved dress, particularly with reference to the power of executors to carry on a trade, and their liability for losses. The Master of the Rolls laid it down as a rule, which admits (*Kirkman v. Booth*, 13 Jur. 525; S. C. *ante*, pp. 157, 158) of no exception,

that to authorise executors to carry on, or permit to be carried on, a trade with the property of a testator which they hold in trust, there ought to be the most distinct and positive authority and direction given by the will for that purpose; and if executors, whether from a desire not to expose the estate to the expense of a Chancery suit, in order to have an ambiguity in the will cleared up, as to the propriety of employing the property of the testator in trade, or for any other reason, suffer it to be so employed, they do it at their own risk. And in a case where part of the property was permitted by the executors to be employed in trade, and forty-two years had expired between the testator's death and the filing of the bill, and all the executors were long since dead, it was held that the parties interested were entitled to an account and inquiry as to all the property which the testator possessed at the time of his death, what the executors had done with it, the circumstances in which it was placed, and what steps they took for the purpose of recovering or receiving any part of it, which, without their wilful default, they might have received. But it was held that no declaration ought, under the circumstances, to be made against the personal representatives of the executors, until they had had an opportunity of giving such explanation as further inquiry might afford. Under the peculiar circumstances of the case, a direction was given that, if the Master could not satisfactorily take the inquiries directed, he should have power to state the circumstances that created the difficulty.

PARTNERSHIP. — *Equal partnership* — *Shares, ownership of among partners* — [*Stewart v. Forbes*, 13 Jur. 523]. — In *Peacock v. Peacock* (16 Ves. 49) it was held that, in the absence of any contract between the parties, or any dealing from which a contract might be inferred, it would be assumed that the parties had carried on their business on terms of an equal partnership. This doctrine was considered in the late case of *Stewart v. Forbes* (13 Jur. 523), where it was held that the case of *Peacock v. Peacock* (16 Ves. 49) only establishes this proposition, that, in the absence of any contract of partnership, or any dealing from which a contract may be inferred, an equal partnership will be presumed. An equal partnership implies not only an equal participation *de facto* in profits and loss, but a right in each partner to claim and insist on such participation. And where, from the books and accounts, it appeared that the plaintiff was the owner of four sixteenth shares, and defendant the owner of four other sixteenth shares, and that there were eight sixteenth shares called "suspense shares," over which the defendant had the absolute control, and for some period of the partnership had allowed the plaintiff to participate equally in the profits of those suspense shares: Held, upon the evidence arising from the books and accounts, and the system of dealing in the partnership, that the

plaintiff was only entitled as the owner of four sixteenth shares in the business.

SETTLEMENT.—*Vesting of portions to children—Surviving child*—[*Jeffery v. Jeffery*, 13 Jur. 482].—If a settlement clearly and unequivocally make the right of a child to a provision under that settlement depend upon the child surviving one or both of its parents, a court of equity has no authority to control such a disposition (*Woodcock v. Duke of Dorset*, 3 Bro. C. C. 569; *Powis v. Burdett*, 9 Ves. 435); but if the language be at all ambiguous as to the period at which, or the contingency on which, the interest shall vest, courts of equity have long had a decided leaning to make such a construction as will give *vested* interests to the children of the settlor when they stand in need of a provision, usually to sons at twenty-one, and to daughters at that age or marriage, though such interest may not be to take effect in possession till after the death of both parents (see *Hope v. Clifden*, 6 Ves. 507; *Perfect v. Carzon*, 5 Madd. 444; *Howgrave v. Cartier*, 3 Ves. and Beam, 86; *Schenek v. Leigh*, 2 Ves. 310). In the case of *Jeffery v. Jeffery* (*supra*), it appeared that in a settlement of personalty on the marriage of M. and W., it was declared that, “from and after the several deceases of M. and W., and the death of the survivor of them, in case there should be any child or children of M. and W. which should be then living, the trustees should pay the trust funds unto such child or children, and to be paid to such child or children at his, her, or their respective age or ages of twenty-one years.” In another instrument personalty was settled in trust “for all and every the child and children of M. which should be living at the time of her decease, and to be paid to them at their respective ages of twenty-one years.” Held, on the construction of each settlement, that the only child who was living at the death of the survivor, took the whole (*Jeffery v. Jeffery*, 13 Jur. 482). *Per V. C. of England*: When the question was first argued before me, I was struck with the argument which arises on such a case as *Woodcock v. the Duke of Dorset*. And there was so much discussion on this case, that I did not decide upon the first instrument without an opportunity of considering it particularly, as there seemed to be some difference between the language of the two instruments. Now, in this case, the £1000 settled appears to have been the property of Margaret; but I cannot, upon reading these words, see anything whatever, either generally or particularly, pointed out as taking in a child which shall not be living “at the several deceases of the husband and wife, and the death of the survivor of them.” It shows how very loose the language is that such a phrase as that should have been constructed. It then goes on—“In case there should be any child or children which should be then living,” then, dealing with the property, as to what may take place between the children—or in case of there being

such, and all of them should die before any of them should attain the age of twenty-one years"—then it is to go as the grandfather should appoint. So that it is, upon the very construction of it, a settlement such that the sole objects were not the children and the husband and wife, but also a third person. I cannot see that the latter words can be so construed as to extend to those who did not answer the description of living at the death of the survivor of the husband and wife. My notion is, that there is nothing here which will at all be adverse to the doctrine of *Woodcock v. the Duke of Dorset*. I must stand by the words as I find them."

COVENANCING.

LEASE.—*Waiver of covenant not to assign, &c.—Not waiver of covenant on subsequent assignment.*—[*Stewart v. Hassard*, 1 Irish Jur. 291]—In the well-known case of *Dumpor* (4 Coke's Rep. 119 b), it was resolved that if upon a condition in a lease not to alien, assign, &c., leave is once granted to alien, assign, &c., the condition is entirely discharged, and that consequently a subsequent alienation or assignment would be perfectly valid though without licence. Lord Mansfield said (4 Taunt. 736), "the profession has always wondered at *Dumpor's* case, but it has been law so many centuries that we cannot now reverse it." However, it was said in one case (*Doe v. Pritchard*, 2 Nev. and Man. 495), that "in modern times the courts have generally considered that a waiver of the breach is not, as was held in *Dumpor's* case, a waiver of the covenant." Upon this distinction the following case has lately been decided in Ireland. There it appeared that there was a lease in 1819 containing a covenant, that the lessee, his heirs, and assigns should not set, sell, alienate, or otherwise dispose of any part of said demised premises, without the consent in writing of the lessor, and in case of breach a penal rent was reserved; in 1824 lessee assigned with consent, in 1835 there was another assignment without consent: held, that the consent to the first assignment was not a general waiver of the covenant: and the lessor was entitled to the penal rent (*Steward v. Hassard*, 1 Irish Jur. 291). *Per* Master of the Rolls, "In this case, however, I do not think there was a general waiver, for where there is a covenant such as the present, and, in a particular instance, the lessor says, 'you may assign,' I do not think that is to be considered a general waiver of the covenant. I consider that was only a particular agreement—a waiver of the covenant as between these parties. The covenant provides that the said A. S. Clarke, his heirs and assigns, shall not set, alienate, or otherwise dispose of any part of said demised premises, without the consent in writing of the said G. Hassard, his heirs or assigns, under the penalty of ten guineas additional yearly rent, to be apportioned over and above the said

reserved yearly rent, &c. I do not think that in this case there has been any general waiver of the covenant, and what took place with regard to the assignment to Joyce was only a particular agreement between the parties."

LEASE.—*Breach of agreement to grant lease—What damages recoverable.*—[*Robinson v. Harman*, 1 Exch. 850.]—Where a party agrees to grant a good and valid lease, having full knowledge that he has no title, the plaintiff, in an action for the breach of such agreement, may recover, beyond his expenses, damages resulting from the loss of his bargain, and the defendant cannot, under a plea of payment of money into court, give evidence that the plaintiff was aware of the defect of title (*Robinson v. Harman*, 1 Exchequer, 850).

LEGACY DUTY.—*Devise of real estate to trustees with power of sale.*—[*Attorney-General v. Simcox*, 1 Exchq. Rep. 749; S. C. 18 Law Journ., N. S., Exch. 61.]—In this case the important question was discussed whether for the purpose of legacy duty attaching it is necessary that the will should contain a positive and absolute direction to the trustees to sell *at all* events, or whether it will attach where the will gives the devisees an *option* either to sell the estate and distribute the proceeds among the objects of the testator's bounty, or to divide the estate among them without a sale, and the trustees do exercise the option to sell. From *re Evans* (2 Cr. M. and Rosc. 201), it appeared that legacy duty should not be paid in this latter case though a sale should actually take place, but the case of *Att.-Gen. v. Mangles* (5 Mees. and W. 120), decided the contrary. In *Att.-Gen. v. Simcox* (*suprà*), it appeared real estate was devised to trustees in trust to convey the same unto and among certain persons mentioned in the will in equal proportions in severalty; and for the purpose of such division and partition the trustees were empowered from time to time to sell all or any part of the devised estates, and were to stand possessed of the money to arise from such sales in trust for the same persons, share and share like; and the trustees accordingly, for the purposes of the trust, sold the whole of the devised estates: held, that this was "real estate directed to be sold" within the meaning of the Stamp Act (55 Geo. 3, c. 184, Schd. pt. 3, tit. "Legacies"), and that legacy duty was payable upon the proceeds of such sale (*Att.-Gen. v. Simcox*, 1 Exch. 749). *Per Pollock, C. B.*: "In the present case the lands were devised to trustees, on trusts, which may be fairly construed to mean that the trustees are to retain the estates unsold, and to allot them among the devisees, if they think that to be for the benefit of the objects of the testator's bounty, or, on the other hand, to sell and distribute the money produced by the sale, if that appears to them most expedient. The trustees, by selling, have shown conclusively that they

did think the most expedient course was to sell, and so in the event there was a direction to sell. Even, therefore, if there were no authority to guide us, we should have thought that duty attached: but in truth the case is governed by *Att.-Gen. v. Mangles* (5 M. and W. 120), which is in principle the same as that before us, the only distinction being that there the devise was in trust to sell, with a power to abstain from doing so, and to allot the estate itself, instead of selling and distributing the proceeds: whereas here the devise is upon trust to allot, with a power, instead of doing so, to sell and distribute the proceeds. In both cases the trustees had a discretion to sell or not to sell, as they should think best for the *cestuis que trust*; and the exercise of that discretion by a sale, was held in *Att.-Gen. v. Mangles*, to cause duty to attach; and the same principle precisely applies here. The only difficulty we have felt has arisen from the decision in *re Evans* (2 Crompt. M. and R. 201), where certainly the court seems to have decided that a sale, under a power to trustees to sell, is not a sale of property directed to be sold, within the meaning of the act. The precise grounds on which the court formed this opinion do not clearly appear. The decision may possibly have turned on the mode in which the proceeds of the sale were in that case disposed of. The statute does not impose duty in every case of a sale directed by a will, but only where the proceeds are by the will given to legatees. Now in *re Evans*, the trustees were not directed to distribute the proceeds, but to invest them in securities, upon the same trusts as attached upon the lands sold. Possibly the court might have thought that this still left the character of real estate attaching on the money produced by the sale, and so that the statute did not apply. It is not necessary for us to give any opinion as to the validity of such a distinction; it is sufficient to say, that if the case is to be taken as an authority for the general proposition, that duty does not attach in any case where the sale is made under a discretion given to the trustees to sell and distribute the proceeds, but without any positive direction imposing upon them the obligation of selling, the case is clearly over-ruled by *Att.-Gen. v. Mangles*, and is, as we conceive, contrary to any fair and reasonable construction of the statute."

WILL.—*Signature at foot or end* (*ante*, p. 166)—*Blind devisor*—[*Re Hellings*, 13 Jur. 568.]—The deceased was blind, and had signed her name some distance down the third side of a sheet of paper, the will itself being written on the first two sides: held, a sufficient signing at the end, under the circumstances (*re Hellings*, 13 Jur. 568).

CASES OVER-RULED, DOUBTED, ETC.

[Continued from pp. 5—8, 93—95.]

Beresford v. Adair (2 Cox, 156), as to appealing against order for cause to stand over with liberty to amend, treated as over-ruled in *Davis v. Chanter*, 10 Jur. 975; 1 Coop. 975.

Carter v. Madgwick (3 Levinz, 339), as to the premises and habendum differing in respect of a present and a future freehold, explained in *Goodtitle v. Gibbs*, 5 Barn. and Cres. 714, 715, 717.

Edmunds v. Groves (2 Mees. and Wels. 642), as to onus of proving consideration of bill is over-ruled, see *Carter v. James*, 8 Jur. 914; S. C. 2 Dowl. and L. 236; 13 Law Journ., N. S., Exch. 373 (but as to this case, 13 Jur. 215; *ante*, p. 94); *Delany v. Newland*, p. 181—183, at l. 5 from top, the word “not” is omitted after the word “admission.”

Towler v. Chatterton (6 Bing. 258; 3 Moo. and Pay. 619), as to statute operating retrospectively, doubted in *Moore v. Darden*, 12 Jur. 131; 2 Exch. Rep. 22.

Howard v. Shaw (9 Irish Law Rep. 335), as to onus of proving consideration of bill, considered in *Delany v. Newland*, *ante*, p. 181—183.

Mann v. Stephens (15 Sim. 377), as to injunctions against using property in different way from that contracted for, &c., explained in *Tulk v. Moxhay*, 13 Jur. 26, 89; Abr. Eq. 10, 11.

Monteith v. Taylor (9 Ves. 615), as to bankrupt defendant dismissing bill, explained in *Blackmore v. Smith*, 13 Jur. 218; 1 Abr. Eq. 25, 26.

Raphael v. Boehm (13 Ves. 590), as to executor charged with compound interest being allowed his costs, explained in *Heighington v. Grant*, 1 Phill. 600; 5 Myl. and Cr. 258; S. C. 10 Jur. 226; see Abr. Eq. 24.

Rothschild v. Currie (1 Q. B. Rep. 43), as to bill being viewed with reference to *lex loci contractus*, was questioned in *Allen app.* and *Kemble*, *resp.* 13 Jur. 287.

ON ACTIONS FOR NEGLIGENCE.

Probably the greater part of our readers have seen in the papers an account of the decision of the Court of Common Pleas in the late case of *Thoroughgood v. Bryant*, to the effect that where the death of a party riding in A.'s omnibus, is caused by the wrongful act of the driver of B.'s omnibus, but in fact the conductor of A.'r omnibus was guilty also of negligence, the representatives of the party killed cannot sustain an action for compensation, under Lord Campbell's Act, against the owners of B.'s omnibus. This decision proceeded on two grounds: first, that the conductor of A.'s omnibus as constituted the agent of the deceased party by the latter's becoming a passenger; and, secondly, that the act of negligence of the agent is the negligence of the deceased passenger, and consequently no action can be sustained for an injury leading to his death. This decision has excited much attention, and we now propose to consider the latter of the two points, leaving the other for consideration when the case is reported in the regular reports. We shall, of course, assume for the present that the decision as to the agency is correct, which will enable us to treat the case as though it were the deceased's own act of negligence.

The general rule may be thus stated: "Where a plaintiff complains of an injury arising to him from the negligence of the defendant, it is open to the latter to show that the plaintiff, by using common and ordinary caution, might have avoided it; or that the immediate and proximate cause of the injury was the unskilfulness or negligence of the plaintiff. This proposition is fully established by the cases of *Butterfield v. Forrester*, 11 East, 60; *Flower v. Adam*, 2 Taunt. 315; *Lack v. Seward*, 4 Car. and P. 106; *Williams v. Holland*, 6 Car. and P. 24; 10 Bing. 112, S. C.; *Vennall v. Garner*, 1 Crompt. and Mee. 21; *Woolf v. Beard*, 8 Car. and P. 373; *Marriott v. Stanley*, 1 Scott's N. R. 392; 4 Jar. 320, S. C. But it is by no means meant that any negligence or improper conduct on the part of the plaintiff will prevent his recovering, for it must be shown that he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence; and it is not sufficient for the defendant to show that the plaintiff did an improper or even an illegal act. In *Bridge v. the Grand Junction Railway Company* (3 Mee. and W. 244), which was a case for the negligent management of a train of railway carriages, whereby it ran against another train, in one of which the plaintiff was riding, and injured him, the defendants pleaded that the parties having the management

of the train in which the plaintiff was, managed it so negligently and improperly, that, in part by their negligence, as well as in part by the defendant's negligence, the defendant's train ran against the other, and caused the injuries to the plaintiff. It was held on demurrer, that the plea was bad in form, as amounting to not guilty; and in substance for not showing, not only that the parties under whose management the plaintiff was, were guilty of negligence, but also that by ordinary care they could have avoided the consequences of the defendant's negligence. In the course of the argument, Mr. Baron Parke said: "The question is, whether the plea is not altogether bad in substance. It is consistent with all the facts stated in it, that the plaintiff (or they under whose guidance he was) was guilty of negligence, and the defendants also; and yet the plaintiff is entitled to recover. Can it be said, that, because a carriage is on the wrong side of the road, a party is excused who drives up against it? It ought to have been shown that there was negligence in not avoiding the consequences of the defendant's default." In giving judgment, his lordship said, "The plea undoubtedly amounts to the general issue. But I think it is also bad in substance, on the ground I before stated, that all the facts alleged in it may be true; there may have been negligence in both parties, and yet the plaintiff may be entitled to recover. The rule of law is laid down with perfect correctness in *Butterfield v. Forrester* (11 East, 60); and that rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule, as to the exercise of ordinary care, is applicable to questions of this kind." In the more recent case of *Davies v. Man* (10 Mee. and W. 546), where the defendant negligently drove his horses and waggon against, and killed an ass, which had been left in the highway, fettered in the forefeet, and thus prevented from getting out of the way of the defendant's waggon, which was going at a smartish pace along the road, it was held, that the jury were properly directed, that although it was an illegal act on the part of the plaintiff so to put the animal on the highway, the plaintiff was entitled to recover. Mr. B. Parké said: "This subject was fully considered by the court, in the case of *Bridge v. the Grand Junction Railway Company* (*supra*), where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovery in an action of this nature must be such as that he could, by ordinary care, have avoided the consequence of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that 'the rule of law is laid down with per-

fect correctness in the case of *Butterfield v. Forrester*,¹ that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong. In that case there was a plea imputing negligence on both sides; here it is otherwise; and the judge simply told the jury, that *the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury*; and that if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road, would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

MISCELLANEA.

Assignment of reversionary chose in action—Purdew v. Jackson.—The doctrine of the case of *Purdew v. Jackson* (1 Russ. 1), that a wife's reversionary chose in action cannot be disposed of so as to bar her right of survivorship, is thus commented on by Mr. Macqueen in his recent work on "*Husband and Wife*." After stating that there are strong objections to the doctrine, Mr. Macqueen proceeds:—"Where, it is asked, is the wisdom of allowing a married pair and their children to starve when the wife has a reversionary chose in action adequate to supply their wants? and where is the consistency of maintaining such a rule in one species of property and violating it in another? If it be the perfection of justice to lock up the wife's reversionary interests in personalty, why are her reversionary interests in realty left at the disposal of herself and her husband? Two things the opposites of each other cannot be right. But of the power over the wife's real estate no complaints are heard; because from this power no inconvenience is felt, but, on the contrary, great utility arises. The provisions for separate use, the restraint upon anticipation, and the equity to settlement, are contrivances amply sufficient for the wife's security. She is more likely to lose than to

gain by the enforcement of a rule which makes property to depend, not upon right, but upon accident. Thus, where, as occasionally happens, a purchaser chooses to rely on the honour of a married woman, he may buy her reversionary choses in action, notwithstanding legal rules. But he incurs a risk, in respect of which his price will not come up to more than a half or a third of the true value of the property. In such a case can it be doubted that the chief sufferer (supposing her to act honestly) is the wife herself? In other cases insurances are effected, but always at a sacrifice, of which the wife feels the severity. The opponents of *Purdew v. Jackson* further contend that 'it has thrown out of the market many valuable interests; and when the principle or theory of the decision is examined, it will be found unsatisfactory, for it professes to be bottomed on the maxim that equity follows the law. But the interest in *Purdew v. Jackson* was an interest known only to equitable jurisdiction, to which there is nothing analogous at law.' The law, therefore, imposed no restraint upon the court, which, in making a new precedent, was free to consult the plain dictates of convenience and utility. The analogy recognised between a legal chose in action and a trust fund in equity is not a little forced and metaphorical. But it seems to fail still more when the property (as in *Purdew v. Jackson*) is actually in court, for in that case the money has been recovered, and is secure. There may indeed be a contest between rival claimants of the fund, but there can be no question with the party against whom, if the case were subject to legal jurisdiction, an action would have lain to compel payment. Better, therefore, say the opponents of *Purdew v. Jackson*, would it have been to give effect to the husband's assignment of the wife's choses in action, subject to her equity. This (which was Lord Hardwicke's notion) would have enabled the husband to make use of the wife's property during the coverture, and, at the same time, would have secured a provision for her in the event of survivorship. Arguments of convenience induced courts of equity long since to disregard or evade the legal rule which says that choses in action cannot be assigned; and it may be doubted whether similar considerations ought not also to have moved them to go a little further, and dispense in many cases with that manual apprehension which lawyers denominate a reduction into possession. Such are the objections which have been urged against this celebrated decision, which, however, has kept its ground for now more than a quarter of a century."

Copyright—Ordering destruction of paper on which pirated work printed—Prince Albert v. Strange.—In speaking of the late decision in *Prince Albert v. Strange*, a writer in the *Jurist* (vol. xiii., pt. ii., p. 254) says: "There can be no question that a court of equity has authority to order a person who has published my work, in derogation of my right (whether by direct order or by mandatory injunc-

tion is perfectly immaterial) effectually to put it out of his power, by destruction of it, if necessary, to use that which is my property—the wrongfully-made *impression*, for instance, in such a case as that of the Attorney-General v. Strange. The court leaves to the wrongdoer the mode of obeying its order, contenting itself with committing him for contempt if he disobeys it. The court is not, in point of *form* (if there be anything in the form in which the jurisdiction is to be exercised), driven to order the destruction of the defendant's property, but throws upon him the onus of that destruction, if he cannot, without incurring it, obey the order which the court has unquestionable authority to make, just as in the case above referred to, of wrongfully-constructed railways or other works; the court simply casts it upon the wrongdoer to put himself and his works in the same position as if he had not done the wrong, not inquiring how he shall do so, but leaving it to him to do it as best he may, with or without injury to his own rights of property. It would indeed, to use the words of the Vice-Chancellor Knight Bruce, be a "slur upon jurisprudence, and a dishonour to the administration of justice," if a person could refuse to put it completely out of his power to enjoy the property of another, by saying that he had so mixed it with his own that he could not do full justice to the plaintiff without doing injury to himself.

Parties to contracts of marine insurance.—The parties to contracts of marine insurance may be any persons not alien enemies, who are excluded by the law of England. An opposite doctrine long prevailed in our courts of justice, the rights of war not being considered as depriving individuals of the benefit of such contracts, as the wants and habits of nations advancing in civilisation had improved and matured, and the legal practice had appeared to strengthen and sanction it. In time, however, the practice broke up this doctrine, and at length entirely superseded it. In the year 1748, a statute passed prohibiting insurances on French property while that country was in hostility with England. And in the 28th Geo. 3 still heavier penalties were inflicted by a fresh statute, though the provisions of these statutes were only temporary, and limited to then existing wars. At length it was rendered positively prohibitory to trade with a public enemy without the sovereign's permission, it being considered that the impracticability of legal intercourse must exclude legal commerce, and that the law rendered no protection or authority to its practice, that consequently there could be no legality in insurances on an enemy's property. The authority of the best writers on the point at once supports this doctrine, and is in not less uniformity with the practice of other countries. The sovereign's license, however, whenever granted for such traffic, so far operates as a suspension of hostilities, and a trustee's suit may, on such ground, be maintained for

the recovery of the interest thus insured even during war ; a hostile state of another country must expose domiciled English subjects to the evils they would incur if living in a martial state. It is a position especially established by the law of nations that any person settled in another country in trade becomes a merchant of the country in which he resides. By the 6 Geo. 1, c. 1, the Royal Exchange Assurance Company had the grant of exclusive right of making assurance in partnership, but by the 5 Geo. 4, c. 114, s. 1, these restraints, so imposed by that law, were removed, and that odious monopoly very properly abolished (10 Law Mag., N. S., 201).

Thefts—Organised system.—Apart from crimes of passion and poverty—apart also from the mere relaxation of moral restraint caused by the familiar exhibition and apparent success of crime—it is well ascertained that an organised corruption of young persons and servants is carried on by adult thieves in most if not in all large towns, with manifold ramifications and tendrils in the country. Theft is a craft, and its annual produce in England alone amounts to many hundred thousand of pounds net profit per annum. In Liverpool alone, some years since, it was estimated at upwards of £297,440, not including the fruits of prostitution, which are also immense. In one of our cities in a western county, a woman was recently prosecuted for receiving stolen goods, who kept open house for servants. Trained to peculation under her accomplished guidance, delicacies and wines for refreshment (the fruits of the system) were constantly accessible to all who entered into her confederacy, and her bed-rooms were also used for the accommodation of those female domestics who allied prostitution with plunder. So cunningly was this school and depôt of theft conducted, that years had elapsed since its establishment before the police could bring it to justice. In the larger towns so extensive and powerful is this traffic, that it is most difficult to protect youths in places from the manifold lures which beset them. A robbery of any magnitude frequently involves a score or more of persons in its suggestion and execution. Of the crimes cognisable in courts, by far the most mischievous to morals is theft. In the first place, it is out of all proportion the most extensive crime. In the next place, it involves far more demoralisation. A crime of violence most probably is perpetrated by one, or at most a few individuals ; almost all crimes are isolated, except thefts, which are in great measure gregarious. It is especially adapted to children (10 Law Mag., N. S., pp. 218, 219).

The Masters' offices in Chancery.—Several pamphlets upon the delays in the Masters' offices in Chancery have lately appeared, among which that by Mr. Field deserves notice, as containing the experiences of a practising solicitor. In speaking of the relative advantages of public and private hearings before the Masters, we

have the following *morçaux*:—"Two-thirds of the cases before Masters are best done in a private room; there is less chattering and asperity among the solicitors or solicitors' clerks attending than there would be in a more public place. As it is, many of them are too fond of making speeches. Besides, much of the business is of a nature to be best done round a table in a quiet room. There is no great deal of personal delay with the Master himself, and what there is does not so much harm from the positive loss of time, as in giving a tone to the system. Some Masters will often be half an hour or an hour after their time, and when they come in say not a word of apology for the valuable time of the solicitors which they have wasted. Solicitors, in consequence, attend less, and send clerks more. This unpunctuality cannot be wondered at. A judge who sits in a private room, to which he lets himself in and out though a side-door by a key, cannot in the nature of things be very punctual. There is no check upon him. Who is it knows that he is not in time? Only his own clerks, whom he may discharge at will, and one or two of the *caneille*—solicitors. Then, again, we have had, at times, Masters so grossly overbearing and offensive, that a gentleman would not go near them if he could possibly avoid it. Happily now there are none such; no body of men could be found more courteous than the present Masters; but most practitioners can remember more than one of a very opposite character. It could only be from sitting in a private room that public officers could become such bullies as the court before now has had in this situation. Were it not useless, the solicitors could tell stories of such Masters which would be thought incredible. Had these Masters occasionally sat in public, they must have been kept in some check."

Copyholds.—The copyhold enfranchisement bill has been thrown out.

Vacation judge.—Lord Denman is Vacation Judge at Chambers during the present assizes.

Death and new appointment of a judge.—Mr. J. Coltman died very suddenly on the 11th of July, 1849, aged 68. He was appointed a judge of the Common Pleas in Hilary Vacation, 1837, upon the retirement of Mr. J. Gazelee. Mr. Serjeant Talfourd has been appointed to the vacant judgeship.

Attorneys practising as proctors.—In the diocese of Lichfield some of the solicitors applied to the Chancellor of Lichfield to be allowed to practise as proctors in the diocesan court there, there being only two proctors practising, and four of them were accordingly admitted. This admission, however, has recently been held by the Court of Arches to be invalid (*Fell v. Bond and others*, 13 Jur. 592). Sir Herbert Jenner Fust, after noticing that formerly there were from four to six practising proctors, but that at this time there were only two actually practising, said, "These gentlemen have all served a

clerkship of five years, and one of them has a son at present articled to him for that period of time. Nothing whatever has been adduced to show that the practice is not as here represented. Why should these gentlemen have served this clerkship, and perhaps, in some instances, have paid heavy premiums, and certainly a heavy stamp duty, if no qualification were necessary, and the Chancellor might admit whom he pleases? No doubt the respondents are most respectable men, and may be very able attorneys and solicitors, but it does not follow that they have any particular knowledge of the practice of the court in which they now seek to become practitioners. There has not been sufficient shown to satisfy me that an additional number of proctors is necessary to carry on the business of this court, or that any inconvenience will arise to the public from the want of a reasonable choice of practitioners. The present proctors having acquired their knowledge at considerable expense, there is a gentleman educating in the same way. To admit the respondents to practise in the court of Lichfield merely because they are attorneys and solicitors would go far to destroy the whole race of proctors in the diocese of Lichfield, for no person would subject himself to the inconvenience of a clerkship of five years, and pay considerable stamp duties, if he could practise without them. Upon these grounds, then, I am of opinion that the decree of the Chancellor admitting these gentlemen cannot be sustained."

Stamps on mortgages to benefit building societies.—In a case of *Walker v. Giles*, the Court of Common Pleas held that, by the conjoint operation of the Friendly Societies Act (10 Geo. 4. c. 56), and the Building Societies Act (6 & 7 Will. 4, c. 32), mortgages to building societies are exempted from stamp duty. Glad as we should be to assist in mitigating the rigour of the stamp laws, especially in their operation upon small transactions, we cannot acquiesce in the correctness of this construction of the latter act, and feel it to be our duty to warn the trustees and advisers of building societies against acting on that decision—a course which, if the liability of such securities to stamp duty should be established, would occasion irreparable mischief, because securities to building societies, if liable to stamp duty at all, are almost always so framed as to be liable to the highest duty, unless an express limitation of the amount to be recovered is inserted, which limitation would, of course, not be inserted by those who acted on the case of *Walker v. Giles* (13 Jur. pt. 1, p. 268).

THE NEW BANKRUPTCY ACT.

The new Bankruptcy Act, or, as the act (s. 2) directs it to be called, "The Bankrupt Law Consolidation Act, 1849," is now the law of the land. The parties whom we have to thank for it are Lord Brougham and the London Committee on the Bankrupt Laws, both of whom, however, affect to have cause of complaint on account of some alterations made in Parliament. This is unfortunate, as it is certain to give rise to one or more acts to "amend."

The act is essentially a "Consolidation Act," and subject to all the objections arising from such a mode of framing an act. Thus we have some entirely new provisions, whilst others are taken from former acts unaltered, or (which will create great confusion) partially altered. It will, therefore, be perpetually necessary to keep in view the old and the new enactments. We here propose to notice some of the more prominent of the alterations introduced by the act. These are chiefly in the following points:—1. The abolition of a fiat and the substitution of a mere petition. This, however, only prevents the necessity for the Chancellor's signature, but does not affect that greater evil to solicitors, the payment of the £10, which is still continued. 2. The commissioners have nearly all the powers formerly exercised by the defunct Court of Review, with an occasional appeal. This will be a salutary change in some matters, particularly those of mere form. Thus, for example, leave for an equitable mortgagee to sell, or party to bid, &c., applications which frequently were very expensive, and caused much unnecessary delay. 3. The eventual reduction of the London commissioners to four. 4. The substitution of stamps on documents for money payments to the officers. No doubt this will be acceptable to solicitors of large practice, but we doubt its convenience to occasional practitioners. 5. In the acts of bankruptcy the time is shortened in the cases of conveyances (from 6 and 2 months respectively to 3 and 1) and of notice to traders to pay, compound, &c., judgment debts, where *seven days* (which seems a favourite period with the framers) is substituted, and this is the period for a summons to trader to pay or compound. 6. The senior commissioner (s. 90) is to exercise the authority of the late Court of Review as to removal, &c., of fiats. 7. A trader petitioning for adjudication against himself (s. 99) must show that he can pay *5s.* in the pound. This will be useful in checking an abuse. 8. The trader has now *seven days* (s. 104) to show cause against the adjudication. 9. Protection is thrown around parties required to sign admissions (s. 123) by making it necessary that some attorney should be present. 10. Provisions are made (s. 135) by which

fraudulent or collusive warrants of attorneys, *cognovits*, or *judges' orders for judgments* within two months of adjudication are invalidated, and they are altogether *void* unless filed within 21 days (ss. 136, 138). These are important provisions, but we think s. 135 will give rise to much litigation. 11. Perhaps the greatest novelty is the power to grant 1st, 2nd, and 3rd class certificates of conformity, according as the bankrupt has been unfortunate in the whole, or in part, or not at all. 12. The introduction of a scheme of distinctly defined offences by bankrupts, punishable by suspension or refusal of the certificate. Provisions are introduced, enabling insolvent traders, with the assent of a proportionate majority of their creditors, to obtain personal protection and *wind-up* their affairs by *trustees*, without the interference of the court, or under the superintendence of the court with the aid of an official assignee; in either case without the stigma of bankruptcy.

Having thus cursorily noticed some of the more important points in the act, we proceed to notice some of the provisions in more detail. All, however, we can do, is to give a general idea of the scope of the act.

Extent of act—Commencement.—The act does not extend to Scotland or Ireland, and it is to commence on the 11th Oct., 1849, and by sect. 4, all proceedings in bankruptcy, and every fiat and petition for arrangement between debtors and creditors depending, shall be proceeded in and brought to a conclusion under the provisions of the act.

Rules and orders.—The commissioners are (s. 6) empowered to make rules and orders for carrying the act into execution, and to regulate the officers of the court. The rules and orders must be approved by the Chancellor.

Constitution of the court.—By sect. 6, the Court of Bankruptcy is to be a court of law and equity, and to continue to be a court of record, and the said court and every commissioner thereof is to have and use all the powers, &c., of a court of record, and each and every of the commissioners for the time being acting in London, and in the several districts in the country, shall, singly and simultaneously, or otherwise as occasion may require, be and form the court for every purpose under this act, or in execution of any duty which may hereafter be imposed on the court, except where otherwise in this act specially provided. By sect. 7, upon the next two occasions of a vacancy in the office of commissioner in London, the vacancies are not to be filled up, and the London commissioners are to be reduced to four.

Sittings of the court.—By sect. 10, the following regulation is made as to the sittings of the commissioners. The court shall sit for the despatch of business daily throughout the year (Sunday,

Christmas Day, Good Friday, Monday and Tuesday in Easter week, and days appointed for public fast or thanksgiving, excepted), and in London, and in each district in the country, the commissioners of the court, or such of them as occasion may require, shall attend for that purpose: Provided that in each district in the country in which there is only one commissioner of the court, such commissioner, or in his absence from illness or other reasonable cause, the registrar of the court in such district, shall so attend; provided also, that during the time appointed by order of the Lord Chancellor for vacations in the several offices of the High Court of Chancery, the commissioners of the court in London, and in the several districts in the country respectively, shall have full power and authority to regulate the sittings of the court, and appoint the attendance of such of them as vacation commissioner or commissioners for that purpose as shall appear fit and necessary for the due administration of justice in the said court.

Primary and appellate jurisdiction.—Much of the jurisdiction formerly exercised by the defunct Court of Review is now to be exercised by the commissioners. Thus, by sect. 12, it is enacted that the court, in the exercise of its primary jurisdiction by virtue of this act, shall have superintendence and control in all matters of bankruptcy, and shall hear, determine, and make order in any matter of bankruptcy whatever, so far as the assignees are concerned, relating to the disposition of the estate and effects of the bankrupt, or of any estate or effects taken under the bankruptcy and claimed by the assignees for the benefit of the creditors, or relating to any acts done or sought to be done by the assignees in their character of assignees by virtue of under colour of the bankruptcy, and also in any matter of bankruptcy whatever as between the assignees and any creditor or other person appearing and submitting to the jurisdiction of the court; and also in any application for a certificate of conformity, and in any other matter (whether in bankruptcy or not) where the court by virtue of this act has jurisdiction over the subject of the petition or application, save and except as may be by this act otherwise specially provided, and subject in all cases to an appeal to such one of the Vice-Chancellors of the High Court of Chancery as the Lord Chancellor shall from time to time be pleased to appoint to sit in bankruptcy: Provided always, that if no such appeal shall be entered within 21 days from the date of any decision or order of the court, and be thereafter duly prosecuted, every such decision or order shall be final; and that every appeal shall be subject to such regulation in regard to deposit of costs as shall by any general rule or order to be made in pursuance of this act be directed.

Registrars of the court.—By sect. 26, the number of registrars sitting in London is to be reduced to four. By sect. 27, in case of

illness or absence of commissioner, the registrar may act for him: but he is not to exercise the power of commitment, or to determine any disputed adjudication, or the allowance or suspension of any certificate.

Messengers in bankruptcy.—By s. 46 the messengers acting in London are to be reduced to four as vacancies occur.

Stamps in lieu of fees.—A novelty to the present generation of lawyers is the substitution of stamps on documents instead of money payments to the officers. This is the revival of an old state of things, and one which will probably receive further application. By s. 46 every document enumerated in the schedule C. shall, in lieu of all fees thereupon, be printed or written upon vellum, parchment, or paper bearing the stamp duty set opposite to such documents respectively in such schedule, and having the word "bankruptcy" impressed on every such stamp: Provided that where any such document shall consist of more than one sheet, only the first sheet thereof shall be impressed with such stamp. By s. 52 no document required to have a stamp impressed thereon shall be received or filed or be used in relation to any proceeding in the court, or be of any validity for any purpose whatever, unless the same shall have a stamp impressed thereon: Provided that if it shall appear that any such document has, through mistake or inadvertence, been received or filed or used without having such stamp, it shall be lawful for the court to order that such stamp shall be impressed thereon, and when a stamp shall have been impressed on such document in compliance with such order, such document, and every proceeding in reference thereto, shall be as valid and effectual as if such stamp had been impressed thereon in the first instance.

The documents enumerated in the schedule of the act are: 1st. Petition for adjudication, arrangement, or certificate of arrangement. Duty, £10. 2ndly. Declaration of insolvency, 2s. 6d. 3rdly. Summons of trader debtor, 2s. 6d. 4thly. Admission or deposition of trader debtor, 2s. 6d. 5thly. Bond with sureties, 5s. 6thly. Search for proceeding, 1s. And lastly, *allocatur for costs* on the following scale:—

Bill not exceeding £5, duty, 1s. 6d.				£	s.	d.
Exceeding £5 and not exceeding £10	.....			0	2	6
" 10 " " 20	.....			0	5	0
" 20 " " 30	.....			0	7	6
" 30 " " 50	.....			0	10	0
" 50 " " 100	.....			0	15	0
" 100 " " 150	.....			1	0	0
" 150 " " 200	.....			1	10	0
" 200 " " 300	.....			2	0	0
" 300 " " 500	.....			3	0	0
" 500 " " "	.....			5	0	0

NOTES OF RECENT LEADING CASES

COMMON LAW.

ASSIGNEES OF BANKRUPT.—*Suing as plaintiffs*—*Non-joinder, effect of*—[*Jones v. Smith*, 1 Exch. Rep. 831.]—It is a well-known rule that the nonjoinder of one joint contractor as a plaintiff is a cause of nonsuit at the trial, with the single exception of executors, in which case the nonjoinder must be pleaded in abatement (see 1 Will. Saund. 291, f.g.; Broom's Part. Act. 3, 6, 18, 103, 104, 2nd edit). This exception was attempted in the principal case to be extended to the assignees of an insolvent. There one assignee sued alone upon a promise made to the insolvent, and the defendant pleaded plaintiff was not assignee of the debts, estate, and effects of the insolvent *modo et forma*. It was urged for the plaintiff, on the argument in banc (the point being reserved at the trial), that the assignees of an insolvent or bankrupt were tenants in common, and that any one of them might sue alone as in the case of executors, at the peril only of a plea in abatement. Such plea not having been pleaded here, it was contended the issue ought to be entered for the plaintiff. The authorities, however, as far as they went, were against the plaintiff. In *Snellgrove v. Hunt* (1 Chit. Rep. 71) Lord Tenterden laid it down that if there are two assignees of a bankrupt in an action on contract both must join; but then it was remarked, the declaration in that case was founded entirely upon promises to the assignees, not to the bankrupt. Then, too, in *Cann v. Read* (3 Atkyns, 569), Lord Hardwicke even held that a payment to one assignee, without the receipt of both, was not a good discharge. So also in *Scott v. Godwin* (1 B. and P. 71), a point very analogous was solemnly determined. It was an action of covenant against lessee by one assignee of a reversion, and it appeared on the record, without plea in abatement, there were two joint assignees of the reversion, there being no averment that the assignee, who had not been joined as a plaintiff, was dead. Chief Justice Eyre said, "The effect of there being joint assignees was that the defendant's covenants became also, by operation of law, contracts with them jointly, and that all causes of action arising out of those contracts must follow the nature of those contracts, and must arise jointly; and it was fundamentally wrong to suppose one could sue alone." As the plaintiff, therefore, was bound to recover by the strength of his own title, it not being alleged by him the other assignee was dead, judgment was given for the defendant. The case lastly cited was held to be decisive of the question in the

principal case. Pollock, C. B., in delivering the judgment of the court, says, "We are of opinion the rule which exists in the case of executors does not apply to that of the assignees of a bankrupt or insolvent. Executors are seised, as the books state, *per my et per tout*, and each executor represents the testator, and may himself dispose of the property. Such is not the case with the assignees of a bankrupt or insolvent; and without going so far as in the case of *Cann v. Read* (3 Atk. 569), where in substance Lord Hardwicke seemed to think the consent of both the assignees of a bankrupt was necessary to give a valid discharge, it appears to us the principle upon which the present case ought to be decided, is to be found in *Scott v. Godwin*. A contract with traders, if they become bankrupt, becomes a contract with the assignees, according to the statute, precisely as if the assignees had themselves been parties to the contract. The assignees in the present case, to whom by the Insolvent Act is transferred the contract with the insolvent, are really in precisely the same situation in that respect as are the assignees of a reversion under the statute of Hen. VIII." (*Jones v. Smith*, 1 Exch. Rep. 831).

BILL OF EXCHANGE.—*Pleading — Gambling consideration — Onus of proof — Notice of illegality*—[*Cole v. Batcock*, 1 Ir. Jur. 331].—We have before (pp. 181—184) noticed a case on the subject of the onus of proof of illegality of consideration for a bill of exchange, and the following case, though chiefly important in a pleading point of view, is usefully referred to. To a declaration upon two bills of exchange, the defendant pleaded "That before and at the time when he first became and was the indorsee and holder and interested in the bills of exchange the plaintiff knew they were given for an illegal consideration." The plaintiff replied, "That he did not before or at the time when he first became and was the indorsee and interested in the said bills know they were given for an illegal consideration." Held, on demurrer to the replication, that as the statement in the plea meant a single allegation that the plaintiff became indorsee and interested at the same moment, or, in other words, had then notice of the illegality, that the traverse was good. The plea also alleged that the money was lost at a certain game called "Hazard," and that the plaintiff well knew that was the consideration for the bills. The replication alleged that the plaintiff did not know that the bills were given for the consideration in the plea mentioned. Held also that it was a good traverse, the replication, being in the same words, must be taken to be co-extensive with those of the plea. Held, that the traverse did not throw the onus upon the defendant of proving a knowledge, in the plaintiff, of the illegality before and at the time of his becoming holder, as if he proved a notice of it before he became so, it would follow he had it at the time (*Cole v. Batcock*, 1 Ir. Jur. 331).

COPYRIGHT.—*Right of foreigner to copyright in England—Proof of prior publication—Evidence—Production of copy*—[*Boosey v. Davidson*, 13 Jur. 678].—The right of a foreigner to acquire a copyright in works first published in England has lately been several times before the courts. In one case (*Cocks v. Purday*, 17 Law Journ., N. S., C. P. 273; S. C. 12 Jur. 677) it was held by the Court of Common Pleas that an alien friend, the author of a work composed abroad, of which he is also the first publisher in England, and which has not been made *publici juris* by a previous publication elsewhere, has a copyright in that work, for an infringement of which he can maintain an action in this country. And that this right is not defeated by a contemporaneous publication of the same work abroad. However, the Court of Exchequer, in a later case (*Boosey v. Purday*, not yet reported), after reviewing all the authorities, has held that an alien resident abroad cannot have copyright in England. And now in the principal case the Court of Queen's Bench, acting on the decision in *Cocks v. Purday* (*supra*) have decided that there is a copyright in England for the works of a foreigner published here without having been before published abroad. In this case, which was an action for infringing the copyright in an opera, the question as to proper proof of prior publication abroad, in order to destroy the copyright, was much considered. The defendant, in order to prove a prior publication, offered in evidence the statement by a witness, that he had seen in print, in Milan, many parts of the opera before the 10th June, 1831. Held inadmissible, without accounting for the non-production of the printed copies. The statement by a witness of his having heard, before the 10th June, 1831, persons in society sing parts of the opera at a piano, with printed music before them, is no evidence that the music in the printed papers was the same as that of the opera in question (*Boosey v. Davidson*, 13 Jur. 678). *Per Patteson, J.*: "By the 5 & 6 Vict. c. 45, s. 11, registration is *prima facie* evidence of copyright; and, by sect. 16, the defendant who means to set up a prior publication must give a notice, stating when and by whom such publication was made; and the plaintiff having relied upon the registration, and the production of the five pieces registered, the defendant had to prove a prior publication, and he accordingly endeavoured to show that the printed opera had been publicly sold. The obvious course for doing this would be to call the tradesman who had sold, or a customer who had bought, the work in question in a course of public sale; in either case the identity of the work so sold with the work in question should, by law, be made apparent, either by the production of the work, so that the contents might be compared, or by accounting for its non-production, so that secondary evidence of such contents might be made admissible. The evidence

in question was adduced to show that the printed paper lying before the musical performer had been purchased in the usual way, and which, for the present argument, may be assumed, and also that its contents were the same as those of the work registered by the plaintiff. But the printed paper itself is the legal evidence of its contents, and the plaintiff had a right to object that there was no legal evidence of its contents unless it was produced or accounted for. The defendant showed no inability to produce the paper—indeed, the contrary was rather apparent, as the bookseller and shopman who were supposed to have sold the work at Milan were shown, by cross-examination, to be present at the trial; and he offered the several presumptions, that the witness carried in his memory the words and music of the plaintiff's work, and the words and music that he had so heard in society, and could attest their identity, and also that the printed paper lying before the performer contained that which was being performed, instead of the certainty which the production of the paper itself would have given, and which certainly is required by law when it can be had."

SLANDER — *Privileged communication* — *Express malice*. — [*Simpson v. Robinson*, 18 Law Journ., N. S., Q. B. 73]. — We have before (pp. 209, 210) stated the general rule as to privileged communications, and the following case may be usefully added. In an action for words which are *prima facie* privileged, evidence tending to make out an admission by the defendant, subsequently to the speaking of the words, of a dispute existing between him and the plaintiff, before the speaking of the words, about a sum of money claimed to be due from the defendant to the plaintiff, is admissible to show express malice; and the evidence of the examination of the plaintiff himself before a commissioner in insolvency on occasion of an application by the defendant to the court to have the debt so claimed by the plaintiff and inserted in his schedule struck out therefrom, and on which occasion the defendant declined to be examined, though called upon, is proper to be left to the jury as evidence of such admission of a previous dispute. Where a justification of the truth of the words had been pleaded, and the plaintiff, during the trial, offered to accept an apology and a verdict for nominal damages, if the defendant would withdraw the plea of justification, which the defendant refused to do, though he did not attempt to prove it: Held, that this conduct on the part of the defendant was also proper to be left to the jury, with reference to the question of malice as well as that of damages. *Per Lord Denman, C. J.*: "The evidence was said to be inadmissible on the authority of *Melen v. Andrews* (Moo. and M. 336), in which Parke, B., declined to receive against a party proof of evidence given in his presence by a witness, and not denied by him. That learned judge thought it safer and better not to lay before the jury the defendant's

conduct in not denying in a court of justice what a witness swore to the prejudice of a party present, although the party had the opportunity of cross-examining the witness, of which he did not avail himself. We do not understand that case as deciding that under no circumstances can such evidence be admitted, though the learned judge thought it in that case safer and better to exclude it, and the plaintiff's counsel acquiesced; for cases might certainly be conceived in which a party by not denying a charge so made might possibly afford strong proof that the imputation was just. But the case does not apply. The object of the evidence in this case was not to deduce the truth of the plaintiff's statement from the defendant's not denying it, but to make it probable that the plaintiff had given such provocation by former disputes, as might naturally be expected to excite the defendant's ill-will towards him."

EQUITY.

ARTICLED CLERKS—*Return of premium on death of solicitor.*—[*Hirst v. Tolson*, 13 Jur. 596].—This case as the right of an articulated clerk to the return of part of premium on the death of solicitor, is a very important one to both solicitors and their articulated clerks. The V. C. of England decided that where a solicitor, to whom a clerk is articulated, dies shortly before the expiration of the second year of the articles, a bill will lie, on behalf of the clerk, against the executors of the solicitor for a return of a proportionate part of the premium of clerkship (*Hirst v. Tolson*, 13 Jur. 596). *Per V. C. of England*: "The case stands in this way: it is alleged that there has accrued a debt, in the sense of a right of the plaintiff, the mother, to have a return of a proportional part of the premium. Then the party (Mr. Tolson) being dead, this is merely a suit against his estate; and it appears to me just the counterpart of a case which was before me the other day, where a party filed a bill against the husband of a feme covert because she (the plaintiff) had advanced money to the wife, and in which cases were cited which did show, that, in the case of the husband being dead, equity did assume a jurisdiction; but, inasmuch as there the husband was alive, I held that I had no jurisdiction over the estate. But here it is admitted that there is a case at law, and the party is dead: therefore you have a right to sue the estate. My motion is, that it is a case in which there is a legal debt, payment of which may be sued for out of the estate. It seems to me, that, on the very face of the contract, there is some debt: I do not say to what amount—that must be referred to the Master. I cannot compel the parties to arbitrate."

JUDGE.—*Judge interested in cause—How far it incapacitates him from acting*—[*The Grand Junc. Canal Co. v. Dimes*, 13 Jur. 503].—It is a well-known maxim or rule of the common law, that no one can be a judge in his own cause; for, as Littleton (s. 212) says, "It is

against reason that if wrong be done to any man, that he thereof should be his own judge (see further Com. Dig. Tit. "Courts." p. 16 and "Justices," I. 3; 1 Salkeld, 369; Broom's Maxims, 84). And this maxim has been held to prevent a justice of the peace, who is interested in a matter pending before the court of quarter sessions, though the interest be merely a liability to pay a rate, from taking a part in the proceedings (see *Reg. v. Cheltenham Paving Company*, 1 Q. B. Rep. 367; S.C., 5 Jur. 867). And the whole will be vitiated, though there was a majority in favour of the decision, without reckoning the vote of the interested party (*Reg. v. Just. of Hertfordshire*, 6 Q. B. Rep. 753; see also *Reg. v. Upton St. Leonards*, 16 Law Journ., N. S., M. C. 84; *Esdaile v. Lund*, 12 Mees. & W. 734). This subject has been lately fully discussed in Chancery, and some limitation has been put upon it, arising from the necessity of the case. It was laid down in the principal case by the Master of the Rolls, that it is a fundamental and important rule, that no one ought to be a judge in his own cause, and that no judge ought, by himself or his deputy, to hear and determine any cause, or make any order, or do any judicial act in a cause in which he has a personal interest; and this rule ought not to be departed from without necessity, but it must give way to circumstances, and to the necessity of avoiding a denial of justice. There is no difficulty in acting on the rule where there are several courts having concurrent jurisdiction, or where there is one court consisting of several co-ordinate judges; but where the whole jurisdiction is vested in one judge, or where there are no co-ordinate judges, and the subordinate judges are in effect deputies, whose decisions are not complete till sanctioned and adopted by the supreme judge, as in the Court of Chancery, cases must arise in which it will be impossible to act in strict conformity with the rule without a failure of justice. And for this reason the rule cannot in strictness and to its full extent, be applied to the Lord Chancellor in cases in which he has such an interest as, according to the practice of the court, does not make him a necessary party to the suit. There is not, and cannot in any case be an incapacity of the judge to make an order or do any act in a matter within his proper, peculiar, and exclusive jurisdiction, if such order or act be necessary to prevent a failure of justice; and, whatever interest a judge may have, if justice cannot be had without an act or order of his, he cannot refuse to act. In cases where questions of this kind arise, the judge must have and exercise a discretion, and having the capacity, must not interfere further than the necessity of the case requires. In a case in which the question was between an individual and a canal company, in which the Chancellor held shares, as to the right of a piece of land over which the canal flowed, and an order was made on appeal by the Lord Chancellor, the Master of the Rolls, who heard the application at the

request of the Chancellor, refused to discharge the order on the ground that it was vitiated by such interest in the Chancellor.

MARRIAGE—Conditions in restraint of marriage—Proviso—Annuity—[*re Corkers*, 1 Ir. Jur. 316].—We have before (pp. 54, 55) called attention to gifts determinable on marriage, and it has been seen that the Lord Chancellor has placed the doctrine on the footing of a qualified contract, according to which the terms of the proviso are made part of the contract, and any one claiming the gift must show that his claim is within the terms of the contract. It is not, according to this doctrine, an unqualified gift for the life of the party, with an attempt to defeat the gift by an illegal condition subsequent. The above doctrine has been acted on in a late case in Ireland where there was a bequest of an annuity of £50 to A. V. C., a widow, for her life, provided she did not marry again. It was held that the annuity determined on the second marriage of A. V. C., and the proviso that she should not marry again was not a condition subsequent so as to be void in restraint of marriage (*re Corkers*, 1 Ir. Jur. 316).

SETTLEMENT—Wife's equity to settlement—Legacy to husband and wife jointly—[*Atcheson v. Atcheson*, 13 Jur. 666].—A court of equity upon the principle that he who would have equity must do equity (5 Myl. and Cr. 97; 4 Hare, 1) will not, where a husband, in order to reduce his wife's property into possession, is obliged to seek its assistance (10 Vesey, 90; 4 *Id.* 15), afford the required aid, except upon the terms of his making a proper settlement upon her (*Sturgis v. Champneys*, 5 Myl. and Cr. 97; *Hanson v. Keating*, 4 Hare 1; S. C., 8 Jur. 949). And the same rule holds as against persons claiming under the husband, as creditors (*Ibid.* 2 Atk. 420; 1 Sim. and Stu. 250). This right of the wife is termed her *equity to a settlement*. The following case is one of some novelty as well as of practical importance. A testatrix gave a legacy, to R. S. A., his wife and children; the husband and wife being entitled to one share equally with the children, the wife, who was living separate from her husband, in a suit instituted by the husband and his assignee, to have the rights of himself and wife and children, in the legacy, ascertained, claimed a settlement out of the whole share given to her and her husband. The husband, on the other hand, claimed a moiety of the share in his own right, and a moiety in right of his wife, and insisted that she was only entitled to a settlement out of the latter moiety:—Held, that all the court could do was to preserve the wife's right by survivorship; and the whole share was directed to be carried over to the joint account of the husband and wife, the dividends to be paid to the husband during their joint lives, with liberty, on the death of either, for the survivor to apply. *Atcheson v. Atcheson*, 13 Jur. 666.

Per M. R. : "The husband says there is either a tenancy in common or a joint tenancy, subject to severance in the ordinary way ; and he claims one moiety in his own right, and the other moiety in right of his wife ; and he proposes that a settlement should be made of the moiety which he claims in her right. But the wife, on the other hand, claims a settlement out of the whole sum, or that the whole sum should be preserved undivided, in order that she may have it if she survives her husband. It is plain, that, if the husband were to be held entitled to the whole in his own right, it would be the same thing as if the wife's name were struck out of the bequest ; but he does not claim that. And, on the other hand, it is equally plain that the wife is only entitled to a settlement out of that which the husband is entitled to in her right ; and if she were held entitled to a settlement out of the whole sum, as if the husband were entitled to the whole in her right, it would be the same as if his name were struck out of the bequest. I think she is not entitled to a settlement out of the whole share, because the husband is not entitled to the whole in her right. Their interest is a joint interest, and if it were an ordinary joint tenancy the claim of the husband might be sustained. But the husband and wife claim by entireties, and their interests do not appear to be subject to the ordinary incidents of a joint tenancy. I am not able to decide what portion ought to be settled upon her. I could derive no assistance from the case of the *Attorney-General v. Bacchus* (9 Price, 30 ; 11 *Id.* 547) ; for though the case was twice argued, and various points raised, and the court at last observed that it would be material to ascertain what would be the effect of a similar joint bequest made to a daughter of the testator and an entire stranger, the judgment was given without any observations on these points, and no reasons were given for the decision, either in the Court of Exchequer or in the Court of Exchequer Chamber. If a bond is given, payable to husband and wife jointly, the husband alone may, in the lifetime of the wife, receive the whole, and if he does not, it will belong to the wife surviving. So, in the case of a legacy given to husband and wife jointly, payment to the husband in the lifetime of the wife would be good ; but if it was not paid to him, the wife would be entitled to it if she survived ; or if the legacy were brought into court, he might have the whole, with her consent. Under all the circumstances, it appears to me, that all which the court can do is to preserve the wife's right to it by survivorship. I am of opinion that the share ought to be carried over to the joint account of the husband and wife, and the dividends paid to the husband during their joint lives ; and, on the death of either, the survivor must have liberty to apply."

VENDOR AND PURCHASER—*Specific performance*—*Possession*—*Time when of the essence of the contract*—*Evidence of purchaser's*

object—Waiver—[*Nokes v. Kilmorey*, 1 De Gex and Smale, 444]. —In the case of a contract for sale, if it appear that the object of one party known to the other was, that the property should be conveyed or possession given on or before a given period, as the case of a house for residence or the like, time is of the essence of the contract. (*Per* B. Alderson in *Hepwell v. Knight*, 1 You. and Coll., Exch. Cas. 415). And it has been decided that whether time was originally of the essence of the contract, and whether if it were, it continued so to be, are questions depending on evidence (*Levy v. Lindo*, 3 Meriv. 81). In the principal case, it was held that in a suit by a vendor for specific performance against a purchaser, if the contract stipulated that the possession should be given at a specified day, it is competent for the purchaser to insist that both time and a vacant possession are of the essence of the contract, and the court will receive as evidence that such was the purchaser's object statements made by the agent of the purchaser at the time of signing the contract. Where a purchaser has consented to enlarge the time for completion, and where a vacant possession was of the essence of the contract, it is competent for him to object to complete at the expiration of such enlarged time, if the possession is not then vacant, and if he has done no act towards completion of the contract after he had notice that vacant possession could not be given at the day. But where a purchaser had by his acts waived the time of completion in the first instance, and had gone on for some time inducing the vendor to incur expenses to perfect his title, and suddenly, upon the discovery that vacant possession could not be given according to stipulation, declined to complete, the court, although it dismissed a bill filed against such a purchaser for specific performance, dismissed it without costs (*Nokes v. Kilmorey*, 1 De Gex and S. 444). *Per* V. C. Knight Bruce: "Now assuming the defendant to have wished to build, and that without delay, on some part of the property, the evidence has failed to satisfy me that he proposed or meant to do so on that smaller portion of it which was held by A. and W., and I am not persuaded that it was a matter of importance to the defendant, that either A. or W. should quit his holding in 1845 or 1846. Still, it cannot, I think, be denied that the defendant had a right to stipulate, and to stipulate effectually, if expressly and distinctly, that whether for a good or a weak reason, time and a vacant possession should be of the essence of the contract. And, upon the pleadings and evidence, I conceive that Lord Kilmorey, being here a defendant in a suit for specific performance, has relevantly alleged, and has sufficiently for the purposes of the cause proved, that in effect he did so stipulate—I do not say on the written contract."

RECENT STATUTES.

Defects in leases under powers.—Those who have had any experience in conveyancing, know how seldom leases granted under powers are valid by reason of the terms of the power not being exactly pursued. This statute is framed to meet the evils arising from this state of things, and if it shall be found to furnish a complete remedy, it will be a great boon. The case is one of great difficulty to deal with satisfactorily, as in most instances, not only the right of the party exercising the power is in question, but that of parties in remainder or reversion, to say nothing of the representatives of each of them. We will now see what the statute offers as a remedy. By sect. 2, leases invalid, owing to a deviation from the terms of the power, are to be deemed contracts in equity, for such leases as might have been granted under the power. It is enacted that where, in the intended exercise of any power of leasing (whether derived under an act of Parliament or not), a lease *has been*, or shall *hereafter* be granted, which is, from non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled after the determination of the interest of the person granting such lease to the reversion, or against other the person who, subject to any lease lawfully granted under such power would have been entitled to the hereditaments comprised in such lease, in case the same have been made *bond fide*, and the lessee named therein, his heirs, executors, &c., have entered thereunder, shall be considered in equity as a contract for a grant, at the *request* of the lessee, his heirs, executors, &c., of a valid lease under such power, with similar provisions. Such contract is to be binding on all persons who would have been bound by a lease lawfully granted. But it is provided that no lessee under such invalid lease, his heirs &c., shall be entitled by virtue of such equitable contract to obtain any variation of such lease, where the persons who would have been bound by such contract are willing to confirm such lease without variation. By sect. 3, the acceptance of rent under the invalid lease is, as against the acceptor, to be a confirmation of the lease. By sect. 4, leases invalid at the granting thereof by reason that at the time of granting the party could not lawfully grant such lease, may become valid if the grantor continues in the ownership, until the time when he might lawfully grant such a lease. By sect. 5, where the lease does not refer to the power, it shall be deemed to have been made in pursuance of it, if it cannot have effect independently of it by reason of the determination of the

estate of the lessor. Sect. 6 saves the rights of the lessees under covenants for title, and for quiet enjoyment, and the lessor's right of re-entry for breach of covenants and conditions. But by sect 7, the act is not to extend to leases by ecclesiastical corporations or spiritual persons, or to leases of any college, hospital, or charitable foundation, or to any lease where, prior to the act, the hereditaments comprised therein have been surrendered or relinquished, or recovered adversely by reason of the invalidity thereof, or there has been any judgment or decree concerning the validity of such lease. The act is not prejudicial to any pending action or suit, and it does not extend to Scotland.

Petty Sessions' Courts. CHAP. 18.—By s. 1, every sitting and acting of justices of the peace, or of a stipendiary magistrate in and for any city, borough, or town corporate having a separate commission of the peace, or any part thereof, within England and Wales, at any police court or other place appointed in that behalf, shall be deemed a *petty sessions of the peace*, and the *district* for which the same shall be holden shall be deemed a *petty sessional division* within past or future statutes having relation to such petty sessions, or to any business to be transacted thereat. By s. 2, the justices at general or quarter sessions, or the council in boroughs, may provide places for holding petty sessions, and the justices may agree for the use of the county court for that purpose "for such time or times, weekly or otherwise, and at such annual rent, and subject to such conditions as to repairs, alterations, or improvements of such building or place as may be agreed on." By s. 3, justices of the peace acting for two or more adjoining counties, ridings, liberties, or divisions, and holding petty sessions on or near to the common boundaries of such counties, &c., may provide places for holding the petty sessions at the joint expense of such counties, and all the powers of the 11 & 12 Vict. c. 101, are to apply to every agreement under this act.

NEW COUNTY COURTS.

Salaries of county court clerks.—At last something, though in a very limited degree, has been done respecting the salaries of clerks of the new county courts, as will appear from the following order of council, issued on the 30th of July, 1849. It orders: That from and after the 1st October, 1849, the person or persons holding the office of clerk of the respective county courts hereinafter mentioned, under the provisions of an act passed in the tenth year of her

Majesty's reign, intituled "An Act for the more easy Recovery of Small Debts and Demands in England," shall be paid by salaries, instead of by fees, and that the sum of £500 per annum shall be the salary attached to the office of clerk of each of the said courts, whether the same shall be filled by one or more persons; and that the sum of £500 per annum shall be paid by way of salary to the person or persons holding the office of clerk of each of the following county courts (exclusive of all salaries to his clerk or clerks employed in the business of such court, and other expenses incidental to the office of clerk to be regulated and controlled by the Commissioners of her Majesty's Treasury), at such times and in such manner as the said commissioners may think fit to direct; but in case the clerk of any one of the said county courts shall have acted in the same capacity in any court mentioned in the schedule (A.) annexed to the said act which has been abolished, and was in the receipt of a larger net income than £500 per annum, then the salary of such clerk shall not be less than the average amount of the salary, fees, or emolument of his former office during the seven years next before the passing of the said act, namely:—The Westminster County Court of Middlesex; the Clerkenwell County Court of Middlesex; the Bloomsbury County Court of Middlesex; the Shoreditch County Court of Middlesex; the Marylebone County Court of Middlesex; the Whitechapel County Court of Middlesex; the Southwark County Court of Surrey; the Lambeth County Court of Surrey; the County Court of Lancashire holden at Liverpool; the County Court of Lancashire holden at Manchester; the County Court of Yorkshire holden at Sheffield; the County Court of Yorkshire holden at Bradford; the County Court of Yorkshire holden at Kingstown-upon-Hull; the County Court of Warwickshire holden at Birmingham; the County Court of Gloucestershire holden at Bristol.

Returns of business transacted in county courts.—It appears that the gross total number of plaints entered in all the county courts of England and Wales during the year 1848 amounted to 427,611; the total number of causes tried to 259,118; the total number of days on which the courts sat to 8,386; the gross total amount of the monies for which plaints were entered to £1,346,802; the total amount of monies for which judgment was obtained (exclusive of costs) to £752,543; and the amount of costs to £199,960. The total amount of money paid into court was £86,292; the total amount of fees received by the officers of the court was £234,274; and the gross total amount of all the monies received was £854,950. The total number of causes tried with the assistance of a jury amounted to 684, in 446 of which the party requiring the jury obtained a verdict. The amount sued for in these courts since their establishment in March, 1847, to December, 1848, was about

\$2,700,000. Now, from this, it appears, that only a little more than half the gross amount sued for has been recovered; that the gross amount of costs has amounted to somewhat more than a fourth (one 3-75th) part of the sum recovered; that the fees to officers have been a little less than a third of the sum recovered; and that only in one case in 2,381 has a jury been demanded. These results are somewhat curious, as shewing, first, the large proportion which the costs of litigation bear to its fruits, even in these popular courts; and, secondly, the extreme indifference of the people to jury trial, when they are left to choose whether they will have justice or not.

Splitting demands—Rent—Double value.—Rent in arrear, and a demand of double value for holding over after notice to quit, under stat. 4 Geo. 2, c. 28, are separate causes of action within s. 68 of the 9 & 10 Vict. c. 95, and, therefore, may be sued for, by separate plaints in the county court. Separate plaints may be tried in the county court for two or more causes of action, which would require to be stated in distinct counts, though they might be included in the same declaration. A demand for double value against a tenant holding over, under stat. 4 Geo. 2, c. 28, is a "plea of a personal action," and may be sued for in the county court, under s. 58 of the 9 & 10 Vict. c. 95. *In re Wickham v. Lee*, 18 Law J., Q. B., N. S., 21.

Prohibition—Title to corporeal or incorporeal hereditaments.—By a local act of Parliament for rebuilding a certain church, trustees were empowered to levy rates upon all houses in the parish, one-half to be paid by the landlord, and the other half by the tenant, the tenants to pay the whole rate in the first instance, and to deduct a moiety out of the rent, and that every landlord should allow of such deduction accordingly, notwithstanding any agreement to the contrary. After the passing of this act, a lease was granted in the parish to a tenant, who covenanted to pay all parliamentary and other taxes and rates. The tenant paid the full rent and the rate, but the landlord refused to deduct a moiety of it from the plaintiff, on the ground that the act only applied to agreements in existence at the time it was passed. The tenant having sued the landlord in a county court for a moiety of the amount so paid for rates: Held, that as no question was raised as to "the title to any corporeal or incorporeal hereditaments" within the 58th section of the stat. 9 & 10 Vict. c. 95, there was no ground for a writ of prohibition. *Semble*, per Parke, B., that the act applied only to agreements entered into before it came into operation. *In re Knight*, 1 Exch. 802.

Prohibition to, where it lies.—The superior courts have no power to issue a prohibition to a judge of a county court in a matter that is within his jurisdiction. Where, therefore, the judge of a county court gave judgment for the plaintiff, notwithstanding at the trial the

defendant's plea, that judgment had already been obtained and execution executed against him in another inferior court, in an action brought in the latter court upon the same cause of action, was admitted to be true, this court declined to interfere. *Toft v. Rayner*, 5 C. B. 162.

Judge's jurisdiction—Service of summons—Prohibition.—An action having been brought against the defendant in the county court, he received no notice of the proceedings, the summons having been served by a mistake at a wrong place. Judgment was given against him in his absence, proof having been given of the service of the summons to the judge's satisfaction. The defendant made an application to the county court under the 9 & 10 Vict. c. 95, s. 80, to set aside the judgment and execution. The judge made an order, but upon terms to which the defendant would not consent. The defendant then paid the amount under protest, and applied to this court for a prohibition: Held, that the judge, having heard the evidence of service, and decided upon it, had jurisdiction in the matter, and that, therefore, no prohibition could be granted. *Robinson v. Lenaghan*, 5 D. and L. 713.

Suggestion to deprive plaintiff of costs—Sufficiency of affidavit.—To deprive a plaintiff of costs under the County Courts Act, 9 & 10 Vict. c. 95, s. 129, it is necessary to enter a suggestion on the roll, and a defendant making an application for this purpose must show affirmatively on his affidavits that the case is not within any of the exceptions contained in the 128th section. A statement, therefore, by the defendant that the plaintiff resided at the commencement of the action within a "short distance" from the defendant, is not equivalent to a statement that the plaintiff did not "dwell more than twenty miles from the defendant," pursuant to the 128th section of the act. *Brooker v. Cooper*, 18 Law J., Exch., N. S., 41.

Interpleader—Goods of third party taken in execution—Trespass.—In the cases of interpleader in the superior courts, it has been held that the sheriff may, notwithstanding the interpleading order, be sued in trespass for breaking into the party's house and seizing his goods (*Hollier v. Laurie*, 3 Com. B. Rep. 334). But the Court of Exchequer are divided in opinion whether the 118th sect. of the 9 & 10 Vic. c. 95, which empowers the judge of the county court to adjudicate upon all claims, "to or in respect of" goods taken in execution by process from the county court, is confined to determining claims to the goods, or extends to a trespass committed in executing the process (*Tinkler v. Hilder*, 13 Jur. 684). The majority of the court are in favour of the latter extended construction, whilst Mr. B. Platt (with whom we agree) takes the former more limited view. The Chief Baron said: "The County Court Act is a very beneficial act—the object of it was to prevent the expense of litigation, and as for

as may be to administer cheap and substantial justice ; and with this view the 118th sect. makes provision for claims arising out of the seizure of goods under executions from that court. Now I think that in construing a remedial statute like this, the object of which was to repress a grievance, it is our duty, so far as we can, so far as the expressions used enable us, to advance the remedy and repress the disease. I am only throwing out an opinion ; I am by no means binding myself not to entertain a different one if any arguments are adduced to me strong enough to confute that which I entertain at present. The question may be raised when the case presents itself of a trespass committed on the house of one party to seize the goods of another. But here the owner of the house and the owner of the goods seized are the same party, and the claim for the house and that for the goods cannot be separated. The point having been mooted to some extent and stated to be one of considerable importance, I throw out this, not as expressing a decided or confident judgment, but only with a view that parties may be aware that such is at least *my* opinion." On the other hand, Mr. B. Platt said : " As I read the section, I do not think it has the force which is supposed to belong to it. Suppose a claimant, not the execution debtor, has goods in his own house, and the bailiff were so ill-advised as to break the outer-door to seize them, and so commit a gross and aggravated trespass, can any one say that this section gives power to the judge of the county court to award damages for that ? I find nothing of the kind in it. This is a case of claim to goods, and I think the words 'in respect of' the goods were meant to apply to cases of lien and such like, and the Legislature used this large language to meet those cases. The section says, 'If any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any court holden under this act, or in respect of the proceeds or value thereof' (all directed to the goods), 'by any landlord for rent, or by any person not being the party against whom such process has issued,' it shall be lawful for the judge to issue a summons, like an interpleader summons, calling before him the party issuing the process, as well as the party making the claim : 'and thereupon any action which shall have been brought in any of her Majesty's superior courts of record, or in any local or inferior court, in respect of such claim, shall be stayed,' and the judge of the county court is to do, what ? not assess damages for the trespass, but 'adjudicate upon such *claim* and make such order ;' between whom ? 'between the parties," i. e., between the claimant and execution creditor. I really do not see why, if a man's house is knocked all to pieces this confined construction of the statute is to be taken, and he is to lose his remedy by action ; and I think that where the claim is made for goods, the power of the judge is limited to awarding such damages as might arise from the keeping and taking of them.'

TENDER OF MONEY.

Conditional tender—Requiring receipt.—We purpose to notice some of the more prominent points in the law of tender, a knowledge of which to the professional man is so important, as he frequently finds himself called upon to act without being able to obtain advice:—

The general rule is, that a tender, in order to be valid, must be unconditional (see the cases collected in Roscoe on Evid. 351, 5th. ed; see also Strong v. Harvey, 3 Bing. 304; Richardson v. Jackson, 9 Dowl. 715). Therefore, where a tender is accompanied by a demand of a receipt in full, it will be bad (Glascott v. Day, 5 Esp. 48; Higham v. Paddeley, Cowp. 213; Ryder v. Townsend, 7 Dowl. and Ry. 119). But though a party tendering money cannot in general demand a receipt for the money, yet where the creditor did not object to the demand of a receipt, but that the sum was insufficient, the tender was held to be good (Cole v. Blake, Peake, 179). But in a case where the defendant took the money out of his pocket, and said, "If you will give me a stamped receipt, I will pay you the money," and the plaintiff replied he would not take it, but would serve him with a Marshalsea writ, Abbott, C. J., held that this was not a good tender (Laing v. Meader, 1 Car. and P. 257). The later cases have somewhat modified the general rule, and we shall, therefore, notice them somewhat fully. In Richardson v. Jackson (9 Dowl. 715), the defendant, in order to prove his plea of tender, called a witness who said that he went to the plaintiff's shop, and saw his sister there, when he told her "that he had come to settle the defendant's account;" she then produced a book, and, after looking at it, said, "she could say nothing about it unless her brother were present;" the witness then offered her £3 11s. She said that "her brother had looked over the book, and that there was £1 or £2 more owing." On his cross-examination, the witness admitted that he told the plaintiff's sister that he would not pay the money, unless she gave him a receipt for £3 11s. A verdict was found for the defendant. On motion for a new trial, it was contended that the demand of the receipt rendered the tender conditional, and therefore invalid; and Laing v. Meader (1 Car. & P. 257), was cited. But the court said, "The case of Cole v. Blake (Peake, 239), is a sufficient authority to warrant the court in deciding against the application. There Lord Kenyon indeed says, that it had been determined that a party tendering money could not, in general, demand a receipt for the money. But where no objection is made on that account, but the creditor insists on receiving a larger sum, he cannot

afterwards object to the tender, because the debtor required a receipt. Here it appeared that the sum tendered was sufficient to satisfy the plaintiff's demand." In *Ford v. Noll* (2 Dowl. & L. 617; S. C., 12 Law Journ., N. S., C. P. 2), the witness called to support the plea of tender stated, "that he had at first offered the plaintiff £5 17s. 8d., as the residue which was due to him; but that on this sum being rejected, he increased his tender by £2., saying, I offer you £7 16s. 8d., as the balance of £35, and request a receipt in full;" the witness added at the trial, "I would not have parted with the money without the receipt." The sum the plaintiff claimed was £42, but the jury assessed the damages at £35, they finding under the direction of the Secondary of London, that a legal and sufficient tender had not been made. A motion was afterwards made to set aside the verdict on the plea of tender, but the court refused the rule, except to reduce the damages to 1s.; Tindal, C. J., saying: "I am of opinion, looking at the whole of the evidence together, the witness who made this tender clogged it with a condition which renders it an invalid and insufficient tender. He said, in fact, that unless he had a receipt in full for £35, he would not pay the money; that is to say, that on this disputed account, unless the plaintiff admitted that £35 was all that was due, he should not receive the money. He calls upon him to admit three things: 1st., That £35 is the full amount which is due: 2ndly, that that sum is reduced by set-off: and 3rdly, the amount by which it is reduced. I do not think that the cases go the length of establishing the proposition, that a tender so made is a valid tender." It may be observed that it has been decided that the question as to whether a tender was made conditionally or not, is one for the jury (*Marsden v. Goole*, 2 Car. and Kirw. 133.)

MISCELLANEA.

Distress—Method of reckoning time.—The 25 Geo. 2, c. 19 (Ireland), prescribes the manner in which a distress for rent is to be disposed of. Section 5 enacts "that all distresses lawfully taken for any such rent, shall, unless redeemed 'within eight days' after the same shall be distrained for, be sold, &c., the person distraining, his agent, or bailiff, first causing one or more notice or notices in writing of the place and time intended for such sale, to be posted six days previous to the time of such sale, &c." The mode in which the time is computed is thus stated in Mr. Longfield's *Treatise on Distress*, p. 93:—"The eight days allowed for redemption are counted inclusive of the day of distress, and the eighth day the notice of sale is posted, and on the fifteenth day the sale takes place. This

method of computation has long prevailed (*Dwyer v. Peacock*, 2 F. and S. 34), and can only be sanctioned by long custom, as it seems at variance with all legal rules established for the computation of times from acts done. *Harper v. Taswell* (6 C. and P. 166). If, therefore, the distress be made on Monday, the notice of sale must be posted that day week, and that day fortnight is the day for the sale." The doubt expressed by the learned author as to the propriety of his mode of computation has been fully justified by the decision of the Court of Queen's Bench in England, in the case of *Robinson v. Waddington* (13 Jur. 537). The action was case for illegal and excessive distress. The question arose on the statute 2 W. and M. sess. 2, c. 5, s. 2, which enacts that when any goods or chattels shall be distrained for any rent, &c., "and the tenant or owner of the goods so distrained shall not within five days next after such distress taken, and notice thereof," &c., replevy the same, the person distraining may cause the goods, &c., to be appraised and sold, &c. At the trial it appeared that the seizure was made at eight o'clock on Saturday morning, the 25th of September, for a year's rent, and the goods were sold on the afternoon of Thursday, the 30th; and it was contended for the plaintiff that the sale was too soon, the tenant having, under the statute, five clear days for replevying his goods and paying the rent, exclusive of the day of seizure and the day of sale. The jury, by the direction of the learned judge, having found for the defendant, a motion for a new trial was made absolute, Lord Denman, C.J., saying "that the court was reluctantly obliged to yield to the later authorities, which produce a revolution in the law upon this point." The rule laid down in this case is, that where a certain space of time is given to a party to do some act, which space of time is included between two other acts to be done by another person, both the days of doing these acts ought to be excluded, in order to insure to him the whole of that space of time. Applying this rule to the practice in this country (Ireland), the sale on the fifteenth day is not legal, the words "within eight days" must be construed as the words "within five days" in the English statute, which would bring the sale to the sixteenth day; and if this rule be applicable to the six-day notice, the sale should be upon the seventeenth day; but whether it be so is not, perhaps without some doubt, as the statute requires the notice to be posted "six days previous to the time of sale," but does not give any act to be done by the tenant within the six days, so that there may be room to contend that the six-day notice should follow the other rule of computation, that where the days are not expressed to be clear, that they shall be held to be exclusive of the first day, and exclusive of the last; and, if this be the true construction, a sale upon the sixteenth day (in Ireland) would be regular (1 Ir. Jur. pt. 2, p. 283).

Criminal law—Murder—Wounding—Larcenies—False pretences—Animus furandi—Servant giving corn to master's horse.—At the conclusion of a long article in the *Law Magazine* (Vol. XI., N. S., p. 1—100) on Crimes and Criminals, speaking of changes in criminal jurisprudence, it is said: "We believe that, as regards the present system of criminal law, no change is essentially needed. The law which makes it a capital offence to attempt to murder only when a wound dangerous to life is inflicted, and not a capital offence when the wound accidentally happens not to be dangerous, is an absurd distinction, inasmuch as it regards not sufficiently the *malus animus*, which exists in the second case just as strongly as in the first. Again, the law draws an absurd distinction between obtaining goods on false pretences, and larcenies; and again, between both of these and civil wrongs. The distinctions are often so subtle and finely drawn, that there is a liability that justice may fail through them. If a man obtains *possession* merely of the goods of another, and then appropriates them to his own use, it is a larceny only, if, at the time he obtained the possession, he *then* intended to deprive the owner of them. The *animus furandi* is not sufficient to establish the theft in law, if it did not exist at the time possession was first obtained; if not, the owner has no remedy but in an action at law. It is clear in this case, that the law requires of the jury that which it is most unreasonable to require, and that which they have usually no adequate means of ascertaining. The law also which renders it larceny in a servant to give more corn to his master's horses than he has ordered him to give, on the ground that he thereby saves himself trouble by increasing the power of the horses to do their work easily, is another freak of jurisprudence, as useless as it is fantastic. But we confess that all these blemishes constitute but specks on the bright surface of our criminal code, "*non offendar paucis maculis.*" Let us be thankful that we have so noble and righteous a code of criminal law, as that which is now firmly established and thoroughly understood throughout the kingdom. We have few institutions equally faultless. A codification of our criminal law is a matter of very small importance whether it be done or left undone. If effected, it will hardly add an iota to the perfect comprehension of its principles, and the facility of its practice."

Discount on stamps.—Formerly the stamp-office allowed a discount of £1 10s. per cent. on stamp dues amounting to £30 or upwards, paid for at one time; but by a late act this discount or allowance is abolished, except on stamps *not* exceeding £10.

The last session of Parliament.—The usual havoc has of course been made, and several bills have died or been abandoned. In consequence of the illness of the Lord Chancellor, the bill for transferring to the County Courts jurisdiction over small charity estates has

been postponed for this session. The Copyhold Emfranchisement Bill has also gone. The bill for enabling widowers to marry the sisters of their deceased wives has been withdrawn, in consequence of the opposition which was made to it; such also has been the fate of the Members' Bankruptcy and Insolvent Debtors' Bill; and, we rejoice to say, of the Juvenile Offenders' Bill, the dangerous character and defects of which are pointed out and commented upon in an article of the present number, and to which we beg to refer our readers. The Bankrupt Law Consolidation Bill will, it is believed, be passed this session, though the Commons have returned it to the Lords in so altered a shape that Lord Brougham could hardly recognise it; there has been no small quantity of labour and pains bestowed upon it in both Houses: but it seems very questionable, whether, in the form in which it will be passed, the mercantile class will be satisfied. Mr. Baines has carried a measure for the regulation of quarter sessions, which is likely to work well; the chief features of it are, the extending to all appeals the provisions in the Removal Act, by which defective statements of the grounds do not prevent the hearing, unless the opposite party has been misled, the enabling parties to state a case for the opinions of the superior courts, in conformity with which judgment may be entered at the sessions, and for submitting controversies to arbitration. The Poor Law Union Charges Bill is also passing; there were in the public press some strong observations upon one of its clauses, by which a compulsory emigration rate is empowered to be made. The clause, however, is preserved, though somewhat modified, the consent of the Poor Law Board being required before the guardians can give the emigration sum without consulting the ratepayers (11 L. Mag. N. S., 205, 206).

The Palace Court abolished.—The days of the Palace Court are numbered, and, with the end of the present year, it is condemned to expire. Thanks to the ever-to-be-remembered Jacob Omnium. This is accomplished by the bill brought in by the Attorney-General for the Amendment of the Small Debts Act, and which has now passed both Houses. By the latter clauses of this bill, no actions are to be brought in the Marshalsea or Palace Courts or the Ffevil Court, after the passing of the act, and those courts are abolished on the 31st December next, and the causes then depending there to be transferred to the Common Pleas or County Courts, as the case may require. An opposition was made to the clause giving compensation to the officers of the abolished courts, but it was unsuccessful, and the Treasury are empowered to fix the amount. We trust the Treasury in making the calculation will not forget to reckon the compensation which was made to these officers on the passing of the County Courts Act, when, as the result showed, they were not

entitled to any compensation, as, in fact, by the operation of that act, they gained more than they lost (11 *Law Mag.*, N. S., pp. 202, 203).

Paupers—Costs of removal.—The interest of the public, so long as the law of settlement exists, says an able writer in the *Law Magazine*, must be taken to be that a pauper actually chargeable be removed at the least possible expense to the place of the last legal settlement, there to be maintained. The present system is founded on the 13 and 14 Car. II. c. 12; but a reform has been worked in order to save the rate-payers from immense costs of appeal and removals, by the 11 and 12 Vict. cc. 82, 91, 110, 114, called Buller's Acts: and to make provision for the payment of parish debts, the audit of parish officers' accounts, and the allowance of certain charges therein disallowed, and where appeals are brought at the same time against the poor-rates of several parishes which may appear to involve some common principle. It is declared to be lawful for the overseers, or other authorities therein, with the consent of the respective vestries of such parishes, to enter into an agreement, to be approved of by the said commissioners, to leave the costs which may be properly incurred in and about the trials of such appeals on the part of the several respondents, as well as the costs of the appellants (if any), which may be awarded against the respondents, in such proportions as shall be fixed and determined with reference to the amount of interest of the several parishes in question as shall appear just. And the said agreement shall continue binding upon the several parishes, and their respective overseers or successors, until the several appeals shall have been finally determined (11 *Law Mag.*, N. S., p. 149).

Special verdicts in criminal cases.—Our attention has been called, by a correspondent, to the observations of a learned counsel in a case of forgery, tried before Mr. Justice Erle at the Oxford Assizes, on the subject of special verdicts in criminal cases. On the judge suggesting to the jury to find the facts specially, the prisoner's counsel is reported to have said, that "the practice of finding special verdicts in criminal cases was a novelty, and that he was not then aware of any authority for it." Abundant authority may, however, be produced in its support, and an examination of the question will leave no doubt that the suggestion of Mr. Justice Erle had the sanction of ancient practice and express decisions of the courts. Blackstone, in treating of verdicts in criminal cases, says, "And such public or open verdict may be either general, guilty or not guilty, or special, setting forth all the circumstances of the case, and praying the judgment of the court; whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all" (4 Bl. Com. 361); but he cites no authority in support of his position. It is laid down by Lord Chief Baron Comyns, that a special verdict may be found "in all

17 Law Jour., N. S., C. P. 91; *Miller v. Hay*, 12 Jar. 985). The only other question that could be raised would be whether this rule applies well to parties named in the record, but not parties to the suit. This, we think, must necessarily follow the same rule; before the statute the rule of law required the names of such persons to be fully given, or an excuse for the omission (*Plow.* 128; *Stephen on Pleading*, 1 Ed. 320), and the statute raises no ground for the distinction. The words are, "that in all actions upon bills of exchange or promissory notes, or other written instruments, *any of the parties* to which are designated by the initial letter, or letters, or some contraction of the Christian name, it shall be sufficient so to designate them" (1 Irish Jur. pt. 2, pp. 310, 311).

Building societies.—*Several shares by one member*.—A very important question raised with regard to building societies is, whether a society is within the stat. 6 & 7 Will. 4, c. 32, if it allows one member to acquire a larger interest than £150 in respect of his share or shares. We believe that no such restriction has ever been adopted, and until this question is decided, no title can be made by the trustees of any building society without the concurrence of the mortgagor; for no purchaser can be advised to rely on the applicability of the doctrine of *Silver v. Barnes* (8 Scott, 300) to building societies, even if that case was rightly decided. In *Cutbill v. Kingdom* (1 Exch. 494), where the validity of a mortgage to one of these societies was called in question, this objection was not taken; but Pollock, C. B., and Alderson, B., suggested a doubt whether the act was intended to sanction a larger interest in one member than £150, and Parke, B., expressed an opinion that it did not. We are afraid that no other conclusion can be arrived at without rejecting the words "not exceeding the value of £150 for each share, such subscriptions not to exceed *in the whole* 20s. per month for each share," as wholly insensible and inoperative (13 Jur. pt. 2, pp. 279, 280).

Articled clerk.—*Serving office of churchwarden*.—If an articled clerk may serve the office of churchwarden without endangering his articles, *quære* (*re Ley*, 13 Law Times, 262).

"Sold again."—Such is the title of an article in the *Law Times* (v. xiii., p. 333), on announcing the defeat of the proposition to take off the attorney's certificate duty. The writer says, "None know better than the movers of this *slam-fight*, that it is a mere make-believe, got up as a diversion from a real one."

Juvenile offenders.—There is a bill in Parliament to extend the 10 & 11 Vict. c. 82, and 11 & 12 Vict. c. 59, to all larcenies by persons not exceeding 16 years of age, and where the value does not exceed 5s., whatever may be the age. In other words these parties may be convicted summarily. [It was not passed].

THE NEW BANKRUPTCY ACT.

(Continued from p. 228.)

Acts of bankruptcy.—The alterations in respect of acts of bankruptcy are chiefly in shortening the periods previously fixed. Thus by s. 68 the conveyance of all a trader's property for the benefit of all his creditors is not an act of bankruptcy, unless a petition for adjudication be filed within *three* months after execution, provided notice be given *one* month after execution in the *Gazette*, &c. By s. 72 trader not paying, securing, or compounding for a judgment debt upon which the plaintiff might sue out execution, within *seven* days after notice, is an act of bankruptcy on the *eighth* day. By s. 73, trader disobeying order of any court of equity, or in bankruptcy or lunacy, personally served *seven* days before day appointed therein for payment, an act of bankruptcy. Then we have in s. 76 a new act of bankruptcy, viz., filing of a petition by any such trader for an arrangement between such trader and his creditors, under the provisions of this act with respect to arrangements between debtor and creditor under the superintendence and control of the court, but a petition for adjudication of bankruptcy must be filed against him within two months after such petition for arrangement shall have been dismissed; and it is provided that no adjudication shall be made on any such act of bankruptcy, unless and until after such petition for arrangement shall have been dismissed.

Trader debtors' summons.—A new form of affidavit, and also a notice requiring payment, is given in the act, and by s. 78 the service is to be personal, or on some *adult* inmate at his usual or last known place of abode or business. By s. 79 the manner of proceeding upon the appearance of the trader is as in 5 & 6 Vict. c. 122, but the trader is required by Sched. J. to depose to a good defence *upon the merits*. By s. 80 trader not attending summons, or refusing to admit the demand, and not within *seven days after personal service* of the summons, paying, securing, or compounding, or giving bond for payment of sum recovered in action and costs, to be an act of bankruptcy on the eighth day, if petition filed within two months. By s. 81 trader signing admission and not paying, securing, or compounding within *seven* days, an act of bankruptcy, and s. 82 provides for case of partial admission. S. 85 is a useful provision; for every such creditor or trader shall have such costs as the court in its discretion shall think fit, or the court may direct the costs of either party of, incident to, or attendant upon, such affidavit and summons, to abide the event of any action for the recovery of

such demand or any part thereof, and in such case such costs shall be costs in the cause, and recovered under the judgment and execution in such action.

Procedure to obtain adjudication.—The fiat being abolished, the proceedings to obtain adjudication of bankruptcy are to be by petition, and every such petition is to be filed of record, and prosecuted as directed by the act; and after the filing of such petition the court is by virtue of the act, and without any commission, fiat, or special authority whatsoever, to have full power and authority to take such order and direction with the body of the bankrupt as mentioned in the act, as also with all his lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customary-hold as freehold, which he shall have in his own right before he became bankrupt, as also with all such interest in any such lands, or tenements, and hereditaments as such bankrupt may lawfully depart withal, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandize, and debts, wheresoever they may be found or known, and to make or order sale thereof in manner herein mentioned, or otherwise order the same for satisfaction and payment of the creditors of the bankrupt. By s. 90 every petition for adjudication of bankruptcy against or by any trader liable to become bankrupt is to be filed and prosecuted in the court within the district of which such trader shall have resided or carried on business for six months next immediately preceding the time of filing such petition, except where otherwise in this act specially provided: Provided that the *senior* commissioner shall have power to order any petition against or by any trader to be prosecuted in any district with or without reference to the district in which the trader shall have resided or carried on business, or to consolidate the proceedings or any part thereof under two or more petitions for adjudication of bankruptcy, or to impound any petition for adjudication of bankruptcy, and the proceedings thereunder, or any part thereof, upon such terms as the *senior* commissioner shall think fit, or to transfer any petition for adjudication of bankruptcy, and the proceedings thereunder, and the prosecution or the further prosecution thereof, from the court in any one district to the court in any other district, and the court to which any such transfer shall be made may remove the official assignee, and appoint a new official assignee to any such bankruptcy. By s. 93 a trader may petition for adjudication of bankruptcy against himself; but unless such trader shall forthwith, after the filing of his petition, and before adjudication of bankruptcy thereunder, make it appear to the satisfaction of the court that his available estate is sufficient to pay his creditors at least five shillings in the pound, clear of all charges (to be estimated by the court) of prosecuting the bankruptcy, such petition is to be dismissed, and no further petition

is to be filed by such trader in the same district without the leave of the court first obtained for that purpose, and the adjudication on any further petition is subject to the like condition as aforesaid as to the available estate of the trader.

Adjudication and securing bankrupt's property.—By s. 104, before notice of any adjudication of bankruptcy shall be inserted in the *London Gazette*, and at or before the time of putting in execution, any warrant of seizure which shall have been granted upon such adjudication, a duplicate of such adjudication shall be served on the person adjudged bankrupt, and such person shall be allowed *seven days, or such extended time not exceeding fourteen days* in the whole, as the court shall think fit, from the service of such duplicate to show cause to the court against the validity of such adjudication, and if good cause is shown the adjudication is to be annulled, and the same shall by such order be annulled accordingly.

Examining debtors to estate.—By s. 122 power is given to examine persons, and by s. 123 if any person examined shall, in and by his examination, signed and subscribed, and also in and by a separate writing in the form contained in the schedule X. to the act annexed, admit that he is indebted to the bankrupt in any sum of money upon the balance of accounts, the court may order that such persons shall forthwith, or at such time and in such manner as to the court may seem expedient, pay the amount so admitted, in full discharge thereof to the official assignee, together with the costs of and incident to the summons of such person, if the court think fit to award costs, or the court may, if it think fit, order the official assignee to pay the costs of the person summoned out of the estate of the bankrupt, and every such order shall have the effect of a judgment in her Majesty's superior courts of common law, and may be enforced accordingly: Provided (and this is novel, and very proper) "that no such order shall be made unless there be present some attorney of one of the superior courts on behalf of the person making such admission, expressly named by him, or, upon his refusal to name such attorney, named by the court to act upon his behalf, to inform him of the effect of such admission, before the same is signed and subscribed as aforesaid, and that such attorney do sign his name as a witness to such admission in the form contained in the schedule Y. to this act annexed."

Warrants of attorney, cognovits, and judge's orders.—The following provisions are extremely important, and deserve to be borne in mind in every action. By s. 135 every warrant of attorney to confess judgment in any *personal* action hereafter given by any bankrupt within two months of the filing of a petition for adjudication, and being for or in respect of (wholly or in part) an antecedent debt or money demand, and every *cognovit actionem* or consent to a judge's

order for judgment given by any bankrupt, within two months of the filing of any such petition in any action commenced by collusion with the bankrupt, and not adversely, or purporting to have been given in an action, but having been in fact given before the commencement of any action against the bankrupt, and such bankrupt being, at the time of giving such warrant of attorney, *cognovit actionem*, or consent (as the case may be), unable to meet his engagements, shall be deemed and taken to be null and void, whether the same shall have been given by such bankrupt in contemplation of bankruptcy or not; and by ss. 136 and 137 warrants of attorney, cognovits, and judge's orders, given by a trader, are to be void unless the same, or a copy thereof, be filed within 21 days after the execution thereof, as directed by the 3 Geo. 4, c. 39.

Certificate of conformity.—By s. 198 it is provided that forthwith after the bankrupt has passed his last examination, the court shall appoint a public sitting for the allowance of his certificate, and at such sitting any of the creditors who has given to the registrar of the court three clear days' notice in writing of his intention to oppose, may be heard against the allowance of such certificate; and the court, having regard to the conformity of the bankrupt to the law of bankruptcy, and to his conduct as a trader before as well as after his bankruptcy, and whether the allowance of such certificate be opposed by any creditor or not, shall judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto, and allow the same, or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require. By s. 199 the certificate of conformity is to be in writing under the seal of the court and the hand of the commissioner, and it is to certify that the bankrupt has made a full discovery of his estate and effects, and in all things conformed, and that, so far as the court can judge, there does not appear any reason to question the truth or fullness of such discovery, and notice of the allowance of such certificate and of the class thereof (see p. 226) shall be advertised in the *London Gazette*, in such manner as may be directed by any rule or order to be made in pursuance of the act. By s. 203, at any time within six months after any certificate of conformity shall have been allowed, any creditor of the bankrupt, or any assignee, official or other, may apply to the *Vice-Chancellor* that such certificate may be recalled and delivered up to be cancelled; and the Vice-Chancellor may, on good cause shown, order such certificate to be recalled and cancelled. Under the former bankruptcy acts the certificate of the bankrupt did not extinguish the debt, but only barred the remedy (*Newton v. Scott*, 10 Mees. and W. 475). And the bankrupt might, by a written promise, revive his liability (9 Jur. 214; *Princ. Com. L.* 52; 14 *Law Journ.*, N. S., Exch. 209). But now.

by the present act, s. 204, no bankrupt, after his certificate shall have been allowed, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement made after the issuing of the fiat or filing of the petition for adjudication of bankruptcy, and if any bankrupt be sued upon any such contract, promise, or agreement, he may plead the general issue, and give this act and the special matter in evidence. Sect. 206 provides for staying the issue of the certificate pending an appeal to the Vice-Chancellor. By s. 207, the allowance or refusal or suspension of certificate, except in case of appeal, is to be final and conclusive, unless obtained fraudulently, in which case the court may order a rehearing.

Arrangements between debtors and creditors.—We now come to the most important of the new enactments relating to arrangements between debtors and creditors, which may be either 1, in court; 2, by deed out of court; 3, by composition after adjudication. By sect. 211, any such *trader* unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before them, under the superintendence and control of the Court of Bankruptcy, and of submitting himself to the jurisdiction of the court, may present a petition to the court, setting forth the true cause of such inability, and praying that his person and property may be protected from all process until further order; and the court on such petition, shall have power to grant *protection*, and may renew the same from time to time as it shall think fit, and, if the petitioner be in *prison or in custody for debt*, may, except in the cases next hereinafter mentioned, order his immediate *release*, either absolutely or on condition, and may *take bail* for his attendance at the several sittings of the court hereinafter mentioned; except where it shall appear by any judgment, order, commitment, or sentence under which such petitioner is in prison or in custody, or by the record or entry thereof, &c., that he is in prison or in custody for any debt contracted by fraud or breach of trust, or by reason of any prosecution against him, whereby he had been convicted of any offence, or for any debt contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication of bankruptcy. By s. 212, every petition is to be filed and prosecuted in the court within the district of which the petitioner shall have resided or carried on business for *six months* next immediately preceding the time of filing such petition, unless the *senior* commissioner

shall order the same to be filed and prosecuted or further prosecuted in any other district, and the date of filing every such petition shall be endorsed thereon, and there shall be filed therewith an affidavit in the form contained in the schedule A b, to this act annexed. By sect. 213, forthwith after the granting of any order for protection, the court shall appoint a *private sitting* to be held at such time and place as it may name, and shall at the same time appoint an *official assignee* to act in the matter of such petition, and upon sufficient cause shown may, if it shall think fit, direct that the estate and effects of the petitioning debtor, or any part thereof, shall be possessed and received by such official assignee, or be taken possession of by the messenger of the court; and the court shall have power to examine on oath such petitioning debtor, or any witness produced by him, or any creditor or person claiming to be a creditor of such petitioning debtor, and to *adjourn* such private sitting, or any subsequent private sitting, from time to time as it shall think fit; and *notice* of such private sitting shall be given in writing to every creditor not less than fourteen days before the same is held, such notice to be sent by post, addressed to every creditor at his last known place of business or residence. By s. 214, the petitioning debtor shall, ten days before the day appointed for the private sitting of the court, file in court, and in such form as may, by any rule or order to be made in pursuance of this act, be directed, a full *account of his debts*, and the consideration thereof, and the names, residences, and occupations of his creditors, and also a full account of his estate and effects, whether in possession, reversion, or expectancy, and of all debts and rights due to or claimed by him, and of all property, of what kind soever, held in trust for him, and shall therein set forth such proposal as he is able to make for the future payment or the compromise of such debts or engagements, and shall furnish the official assignee with a copy of such account. By s. 215, at the private sitting of the court, or at any adjournment thereof, the creditors shall prove their debts, and the petitioning debtor shall attend, and make oath of the truth of the account filed by him, and may be examined thereon; and if at such sitting, or at any adjournment thereof, *three-fifths in number and value* of the creditors who have proved debts to the amount of £10 shall assent to the proposal of such petitioning debtor, or to any modification thereof, the court shall appoint another private sitting for the *confirmation of such proposal* or modified proposal, such second sitting to be held not earlier than fourteen days from the first sitting, and notice thereof in writing shall be *personally* served on every creditor who was *not* present by himself or his appointed agent at such first sitting, *seven clear days at least* before the day appointed for such second sitting: Provided always, that the court may make order in any special case

that service of such notice at the last known place of abode or business, or usual place of resort of any creditor shall be deemed good service. By s. 216, at the second sitting, or at any adjournment thereof, the creditors may also prove their debts, and if *three-fifths in number and value* of those who have proved debts to the amount of £10 shall agree to accept such proposal as was assented to at the first sitting, the terms thereof shall be reduced into writing, and the creditors shall sign the same; and such resolution or agreement (subject to confirmation) shall thenceforth be binding and of full force, as well against the petitioning debtor as against all persons who were creditors at the date of his petition, and who had notice of the said several sittings of the court; and the court, if it shall think the same reasonable and proper to be executed, after hearing such creditors, by themselves, their counsel or attorneys, as may desire to be heard either for or against such resolution or agreement, shall approve and confirm the same, and cause it to be filed and entered of record, and shall grant to the petitioning debtor a certificate of the filing and entering of record of such approval and confirmation, and shall from time to time endorse on such certificate a *protection from arrest*; and such petitioning debtor shall be free from arrest at the suit of any person being a creditor at the date of his petition, and having had such several notice or notices as aforesaid; provided however, that no such protection shall be valid in favour of any petitioning debtor who shall be proved to have been about to abscond beyond the jurisdiction of the court, or who has concealed or is concealing any part of his estates or effects, nor against any creditor whose debt is not truly specified in the account filed by such petitioning debtor, nor against any creditor whose debt has been contracted by reason of any manner of *fraud or breach of trust*." By s. 218, after the approval and confirmation of such resolution or agreement, all the estate and effects of such petitioning trader shall vest in the *official assignee* (if such shall be required by virtue of such resolution, and either alone or jointly with any person or persons, as may be expressed in such resolution), as fully as if such official assignee were an assignee under any bankruptcy. By s. 221, so soon as the resolution or agreement has been carried into effect, and the creditors of such petitioning trader have been satisfied, the court shall give to such petitioner a *certificate* under the hand and seal of the commissioner, setting forth the filing of the petition, the resolution or agreement of the creditors, and that the said resolution or agreement has been fully carried into effect; and such certificate shall operate as fully as if the same were a certificate of conformity under a bankruptcy, except only that any debt which shall have been contracted wholly or in part by reason of any manner of fraud or breach of trust, or without reasonable probability

at the time of contract of being able to pay the same, or by reason of any judgment in any prosecution for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication of bankruptcy, shall not be barred by such certificate.

Sect. 223 contains most important provisions, which are well calculated to check the presentation of petitions by persons whose conduct has not been proper, and to ensure the due prosecution of the petition when presented. It enacts that if the petitioning debtor *shall* not duly attend the sittings of the court, or if he shall not duly file his account, or if he shall fail to obey any order of the court, such *petition shall be dismissed*; and if at the first private sitting, or at any adjournment thereof, the proposal of the petitioning debtor, or some modification thereof, be not assented to, or if at any time after the filing of any petition for protection it shall be shown that the debts of such petitioning debtor or any part thereof have been contracted by reason of any manner of fraud or breach of trust, or without reasonable probability at the time of contract of being able to pay the same, or by reason of any judgment in any prosecution for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, malicious arrest, or malicious prosecution of a bankruptcy, or if it shall be shown that the affidavit filed with his petition was wilfully untrue, so far as concerned the assets ready to be produced by him, or that he has not made a full disclosure of his debts and credits, estate and effects, and is not desirous of making a *bond fide* arrangement with all his creditors, or that his proposal to that effect is *not reasonable and proper* to be executed under the direction of the court, or that he *has postponed the presentation of his petition longer than was excusable*, or if within three months of the time of presenting his petition he shall have assigned, transferred, or made away with any portion of his estate or effects otherwise than in due course, or shall have voluntarily done or suffered any act whereby his goods shall have been taken in execution, the court may adjudge such petitioning debtor *a bankrupt*, and may adjourn all further proceedings in the matter into the *public court*, and advertise such adjudication, and appoint sittings for choice of assignees and for last examination, as in bankruptcy.

Arrangements by deed.—By s. 224, every deed or memorandum of arrangement entered into between any such trader and his creditors, and signed by *six-sevenths in number and value* of those creditors whose debts amount to £10, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, manage-

ment, and mode of winding-up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall *not* have signed such deed or memorandum of arrangement as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy. However, it is provided by s. 225, that no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall *not* have signed the same until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, *unless* such trader shall within such time obtain from the court an order or certificate of the said court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the court within the district of which the trader shall have resided or carried on business for *six months* next immediately preceding his suspension of payment to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who shall not have had *fourteen days'* notice of any intended application for such order or certificate as aforesaid shall be bound thereby. By s. 226, when the trustee or inspector under any such deed or memorandum of arrangement, or, if there shall be no such trustee or inspector, when any two of the creditors shall be satisfied that *six-sevenths in number and value* of the creditors whose debts amount to £10 and upwards have signed such deed or memorandum, it shall be lawful for such trustee or inspector, or for such two creditors, as the case may be, to certify the same to the court in writing, and such *certificate* shall be filed with the registrar of the court, and shall thereupon be *prima facie* evidence in all courts of law and equity that such deed or memorandum of arrangement has been so signed. By s. 227, every such certificate shall have appended thereto a full account of the debts of such trader, together with the names, residences, and occupations of his creditors, and shall be accompanied by an affidavit by such arranging debtor verifying the same. Sect. 229 contains a most important provision, for it is thereby enacted that if any creditor shall be desirous to show that the administration of the estate has not been duly conducted in conformity with such deed or memorandum of arrangement, he may apply to the court *by petition*, supported by affidavit, stating any facts or circumstances to show that such administration has not been duly conducted, and thereupon

the court may consider the subject matter of such application, and may direct an inquiry into the subject of such application, and generally may make such order in the matter of such application and the costs thereof as shall appear just.

Composition after bankruptcy.—We now arrive at two sections which introduce a novel proceeding in bankruptcy, for they provide for an offer of *composition by the bankrupt after the fiat*. Sect. 230 enacts that any bankrupt, at any time after adjudication of bankruptcy shall have been made against him, may call a meeting of his creditors (whereof, and of the purport whereof, 21 days' notice shall be given in the *London Gazette*), and if the bankrupt or his friends shall make an offer of composition, and *nine-tenths in number and value* (see *infra*) of the creditors assembled at such meeting shall agree to accept the same, another meeting for the purpose of deciding upon such offer shall be appointed to be holden, whereof such notice shall be given as aforesaid, and if at such second meeting nine-tenths in number and value of the creditors then present shall also agree to accept such offer, the court shall and may, upon such acceptance being testified by them in writing, and upon payment of such sum as the court shall direct, annul the adjudication of bankruptcy, and supersede or dismiss the fiat or petition for adjudication, and *every creditor of such bankrupt shall be bound to accept of such composition so agreed to*.

By sect. 231, in deciding upon the offer of composition, no creditor whose debt is below £20 shall be reckoned in *number*, but the debt due to such creditor *shall be computed in value*; and any creditor to the amount of £50 and upwards residing *out of England* shall be personally served with a copy of the notice of the meeting to decide upon such offer as aforesaid, and of the purpose for which the same is called, so long before such meeting, as that he may have time to vote thereat, and such creditor shall be entitled to vote by letter of attorney, executed and attested; and if any creditor shall agree to accept any gratuity or higher composition for assenting to such offer, he shall forfeit the debt due to him, together with such gratuity or composition; and the bankrupt shall (if thereto required) make oath before the court that there has been no such transaction between him, or any person with his privity, and any of the creditors, and that he has not used any undue means or influence with any of them to obtain such assent.

Affidavits.—The 243rd sect. provides for the swearing of affidavits, and enacts that affidavits to be made or used in matters of bankruptcy, or in any matter or proceeding whatever under this act, shall and may be sworn before the court, or any commissioner, registrar, or master thereof, or before a Master in ordinary or extraordinary of the High Court of Chancery, or before any clerk of

affidavits, assistant clerk, or second assistant clerk of affidavits of the High Court of Chancery, or in Scotland or Ireland before such Master extraordinary aforesaid, or before a magistrate of the county, city, town, or place where any such affidavit shall be sworn, or elsewhere before a magistrate, and attested by a notary, or before a British minister, consul, or vice-consul.

By sect. 244 the affidavit of a prisoner may be sworn before a visiting justice or keeper of the prison.

Solicitors.—It is provided by sect. 247 that every solicitor of the High Court of Chancery heretofore or hereafter duly admitted as a solicitor of the Court of Bankruptcy in manner directed by the statute passed in the Parliament holden in the sixth and seventh years of the reign of her present Majesty (cap. 73), intituled an "Act for consolidating and amending several of the Laws relating to Attorneys and Solicitors practising in England and Wales," and subject to the provisions in the same act, may appear and plead in any proceedings in the court, without being required to employ counsel; and in case any person not being such solicitor, shall practise in the court as a solicitor, he shall be deemed guilty of a contempt of court, and be liable to all the penalties incident thereto.

NOTES OF RECENT LEADING CASES.

COMMON LAW.

DISTRESS.—*What not distrainable—Things not restorable in same plight—Perishable commodities—Meat—*[*Morley v. Pincombe*, 2 Exch. Rep. 101.]—It is a well known rule of law that commodities which cannot be restored upon replevin in the same plight and condition as that in which they were when taken, are not distrainable for rent at common law (1 Rolle's Abr. 666; Com. Dig. tit. "Distress," C. It was on this principle that the Court of Exchequer has recently decided that the flesh of animals lately slaughtered cannot be distrained (*Morley v. Pincombe*, 2 Excheq. Rep. 101; S. C. 18 Law Journ., N. S., Exch. 272). *Per Parke, B.*: "How can commodities of a perishable nature, and which cannot be restored in the same state as that in which they were taken, be made the subject of distress? The common law is not taken away by the 2 Will. and Mary, c. 5. It was said by L. C. J. Willes, in *Sampson v. Hartopp* (Willes, 515), that 'cocks and sheaves of corn were not distrainable before the statute of 2 Will. and M. c. 5, which was made in favour of landlords, because they could not be restored again in the same plight and condition that

they were before upon a replevin; but must necessarily be damaged by being removed." *Per Rolfe, B.*: "The rule is plain; you cannot distrain commodities which are liable to perish within a reasonable time after they have been taken." And Alderson, B., after referring to 1 Rolle's Abr. 666, said: "The rule is plain—what is true of corn, is true of the flesh of pigs."

LANDLORD AND TENANT.—*Lease—Estoppel—Lessee estopped by recital of lessor's title in lease—Tenant at sufferance—Use and occupation.*—[*Bayley v. Bradley*, 5 Com.-Bench Rep. 396.]—In this case it appeared that by indenture of lease, dated the 26th of June, 1810, between A. (the father of the plaintiff) and B. (the father of the defendant), reciting a former lease of the 27th of July, 1801, made between W. S. and M. his wife, and A., which recited that M. was entitled to moiety of lands in West Fen, and to two-thirds for life, or for some other estate of freehold, and that A. was entitled to the other moiety and the other third part respectively, or some other share of the same lands, for some estate of freehold, &c.; and by which W. S. and M. his wife demised the moiety and two-third parts respectively of M. to A. for forty years from the 5th of April, 1801; A. demised to B., amongst other premises, the lands of which M. was by the recital in the lease of 1801 said to be entitled to two-thirds, and himself, A., to one-third (of the lands in West Fen), for the remainder of the term of forty years, except the last ten days. A. died in 1813, and B. in 1818, leaving the plaintiff and defendant their respective representatives. The defendant continued in the occupation of the lands in West Fen down to the time of the trial, he and his father having regularly paid rent to the plaintiff and his father down to Lady-day, 1841, when the lease of 1801 expired. In debt for use and occupation of an undivided third part of the lands in West Fen, since Lady-day, 1841: Held, that the recital in the lease of 1801 was *prima facie* evidence that A. was entitled to one-third of the lands in West Fen in fee; and that the plaintiff had a right to treat the defendant as a tenant at sufferance of such undivided third part for the period during which he held on after the expiration of the lease, and to sue him for use and occupation in respect thereof. *Semble*, that the estoppel created by the recital ceased upon the expiration of the lease (*Bayley v. Bradley*, 5 C. B. 396). *Wilde, C. J.*: "On the question whether the defendant was estopped from denying the plaintiff's title, the court was of opinion that, at all events, the lease established a *prima facie* case of title in the plaintiff, which the evidence adduced by the defendant was not, in point of fact, in the judgment of the court, sufficiently strong to rebut; so that, even supposing the first question to be decided in favour of the defendant, the second question [whether supposing there was no estoppel, the defendant had succeeded in showing that the

title was not in A. or the plaintiff, but in M., the wife of W. S.] must be decided in favour of the plaintiff. On the third question, namely, whether the action for use and occupation would lie, the defendant having failed to show that the title was not in the plaintiff, the court is of opinion that the objection taken by the defendant at the trial has no foundation; for, that the plaintiff had a right to treat the defendant as a tenant at sufferance of the undivided third part of the eighty acres, for the period during which he held on after the expiration of the lease, and to sue him in use and occupation in respect thereof."

EQUITY.

SPECIFIC PERFORMANCE.—*Contract by letters—Offer and acceptance.*—[*Clive v. Beaumont*, *infra*.]—A contract for sale may be made by letters between the parties, where from them it can be made out that there has been an offer on the one part, and an acceptance on the other. With respect to the acceptance, it must not be conditional, but in the very terms of the offer (see *Routledge v. Grant*, 4 Bing. 653; *Jordan v. Norton*, 4 Mees. and Wels. 155). In the principal case a proposal by a purchaser to take the remainder of a lease was answered by letter, which, after acceding to the proposal, added, "We hope to give you possession at half-quarter day:" Held, that the addition did not introduce a new term, but that the acceptance was unconditional. It is not sufficient for a party who intends to rely upon a waiver of title to allege upon his pleading the facts constituting the waiver; he must show how he means to use the facts by alleging that the title has been waived thereby. *Semble*, that where the purchaser, after transmission to him of the original lease, prepares a draft assignment, and makes various objections as to repairs and other matters, but does not require production of the landlord's title, he will be considered to have waived its production. *Semble*, that a decree for specific performance should not declare that the agreement ought to be performed, if a good title can be made. *Clive v. Beaumont*, 1 De Gex and S. 397. *Per* Knight Bruce, V.C.: "I am of opinion that the words, 'We hope to give you possession by the half-quarter day,' were not intended to operate, and did not operate, as a qualification of the contract or a qualification of the acceptance; but that if they had operated as a qualification of the contract or a qualification of the acceptance the circumstances which afterwards occurred were more than sufficient to do away with any possible effect that could be supposed to arise from it."

CONVEYANCING.

POWER.—*Construction of—To appoint to children—Effect of curatory limitation in favour of party not capable of taking upon per-sonal limitation.*—[*Doe dem. Blomfield v. Eyre*, 5 Com. Bench

Rep. 713.]—Where there is a complete execution of a power, and something *ex abundanti cautela* added, which is improper, the execution will be good, and only the excess be void. Thus, where a partial interest is given to an object of the power, with remainder to a person not an object, that part only is void which the power does not authorise (see *Adams v. Adams*, Cowp. 651; *Brudenel v. Elwes*, 7 Ves. 382). But when the boundaries between the excess and execution are not distinguishable, as, for example, when the extent and effect of so much as is within the power is greater or less, according as the remainder is valid or invalid, the appointment will be invalid (see 2 Sugd. Pow. 80; *Pitt v. Jackson*, 2 Bro. P. C. 51). These observations will introduce the principal case (which was error from the decision of the C. P. reported in 2 Com. B. Rep. 557; 10 Jur. 1084; 16 Law Journ., N. S., C. P. 64). There A., a copyholder in fee, in contemplation of her marriage with B., surrendered the copyhold to the lord, to the intent that he might regrant to the use of A. until the marriage; and, after the marriage, to the use of B. for life; and, after his decease, to A. and her assigns for life; and, after her decease to the use of such child and children of the marriage, and for such estate, &c., charged with any sum or sums for any other of their children as A. should by deed or will appoint, &c.; and, in default of appointment, to the use of all the children of the marriage in equal shares; and, in default or failure of such children, then, after the decease of B., to the use of A., her heirs and assigns. The marriage took place, and two sons having been born, A., by a will referring to the power, devised and appointed the tenement to her eldest son C., his heirs and assigns, after the decease of B., upon condition that C. should pay to D., her second son, £200 within one year after the decease of B., or on D.'s attaining the age of twenty-one. The will then proceeded, "but in case neither of my sons aforesaid shall be living at the decease of B., then I do give, devise, direct, and appoint the said copyhold messuage, &c., unto E. (the father of B.), his heirs and assigns," in trust for sale. After the date of the will four other children were born of the marriage. A. died, leaving B.; C. and D. died before B.: Held (in affirmance of the judgment in the Common Pleas), that the appointment in favour of C. was not rendered void by the subsequent limitation to E., notwithstanding that the limitation to E. was to a person incapable of taking. (*Doe dem. Blomfield v. Eyre*, 5 C. B. 713.) In the court of error the plaintiff's counsel contended that the void appointment over to persons not objects of the power, was in the nature of a conditional limitation, and that as it never took effect, by reason of the incompetency of the appointees, it could not operate to displace the previous estate. Mr. Baron Parke in delivering judgment, said: "Counsel contended that where

there is an estate in fee, liable to be defeated on a condition subsequent, and that condition either originally was, or by matter subsequent became, impossible to be performed, the defeasible estate was made absolute, and he cited Co. Litt. 206 a. Of this there is no doubt; the principle is applicable to this case, if the condition was impossible. But the question is, what was the condition by which the testatrix meant the estate to be defeated? Was it—if the two sons should die in the father's lifetime? or was it—if they so died, *and* the estate should by law vest in the father-in-law? In the former case the plaintiff would fail; in the latter he would succeed. This question is not peculiar to cases of appointments under powers: it might arise upon an ordinary will. * * * In the case before us the testatrix says in substance: 'If my son John and his brother William die in their father's lifetime, I do not mean him (John) to have the property, but I give it over to strangers.' That which defeats the estate of John is the death of himself and brother in his father's lifetime—not the giving over of the estate to strangers. The reason why John's representatives cannot claim the property is, that his mother expressly declared that in the event which happened he should not have it. How she would have disposed of it, if she had known that she could not give it in the mode proposed by her will, can only be matter of conjecture. One thing quite certain is, that she has not expressed any intention that in the events which have happened, John should take; and as he could only be entitled by virtue of an expressed intention in his favour, we think that he fails to establish any right." We must add that this reasoning does not appear to us to be sound, and we shall hereafter examine the case with the aid of a note furnished by the reporters.

PROBATE DUTY.—*On property increased in value between death and administration—Improved leaseholds*—[*Doe dem. Richards v. Evans*, 10 Q. B. Rep. 476; S. C. 11 Jur. 609, 610; 16 Law Journ., N. S., Q. B. 305.]—It has long been a debated point, whether where land has been improved in value (as by building) between the owner's death and the grant of administration, the stamp duty on the letters of administration is to be calculated with reference to the value at the death, or at the time of the granting of administration. By sect. 38 of 55 Geo. 3, c. 184, the oath to be taken by an administrator, upon application for letters of administration is, that the estate and effects of the deceased are under the value of a certain sum. The administration is of the property which the intestate possessed in his life-time, and at the time of his death. In Gwynne on Probate Duties, 23, it is said, "The value of the personal estate should be taken, for the purpose of ascertaining the duty, at the time of proving the will, and obtaining the letters of administration, and not at the decease of the testator or intestate; and that the Com-

missioners of Stamps require all rents, interest, and dividends, accruing after death, and before the date of the probate or letters of administration, to be included in the estimate upon which duty is paid; but the writer adds, that there has been no judicial decision upon the point, and that counsel of great eminence have held a different opinion. In *White v. Rose*, in error (8 Q. B. Rep. 493, 499), Lord Abinger said, "Can the courts of common law enter into such an inquiry at all? I recollect once objecting to a probate, on the ground that the stamp was not sufficient for the amount of property, but Lord Kenyon would not listen to the objection." In the principal case it was held that the stamp upon letters of administration is to be regulated by the value of the property at the time when they are granted, and not at the time of the death of the intestate. An intestate died possessed of a leasehold estate under the value of £100. which, by the subsequent erection of a building upon it, was of the value of £100. and upwards, at the date of the letters of administration: Held, that a stamp of £1 was insufficient. (*Doe dem. Richards v. Evans, supra*). Per Lord Denman: "This building has become inseparably part of the estate which belonged to the testator, for which probate was taken out. A court of common law cannot inquire how much the estate was worth at the time of the death of the intestate."

WILL.—*Personal estate—Limitation to issue—Power of disposition superadded.*—[*Delap v. Hall*, 1 Ir. Jur. 312.]—It is a well-known rule that a devise of personal estate in such terms that if the subject-matter were realty would give an estate tail, gives to the devisee an absolute interest (Ferne's Cont. Remained, 461, 463). Exceptions, indeed, have in some cases been made where to words of limitation further words of limitation have been superadded, in which case the first words of limitation have been converted into words of purchase (*Hockley v. Mawbey*, 1 Ves. jun. 138 [a doubtful case]; *Doe v. Lyde*, 1 Term R. 593; *Crawford v. Trotter*, 4 Madd. 361). And it has been contended that the mere addition of a power of disposition will have the same effect. But the contrary has recently been decided in Ireland, where it was held that a bequest of chattels real to A. for life, remainder to his lawful issue, to be disposed of to them as he may think fit, and, on failure of his lawful issue, over, vested the absolute interest in A. (*Delap v. Hall*, 1 Ir. Jur. 312). Per L. C.: "All the cases tend to this, that the mere introduction of a power such as this is not enough to take it out of the general doctrine. The first case to which I shall refer is *Doe v. Applin* (4 T. R. 82); then there is *Seale v. Barter* (2 Bos. and P. 485). That was a devise 'of all the testator's lands to his son John, and his children lawfully to be begotten, with power to settle the same, or any part thereof, by will or otherwise, to them or any of them, as he should think proper, and in default of such issue over.' It was held

that John took an estate tail, and that this construction 'was not weakened by the power.' The power, it was said, by Lord Alvanley, in delivering the judgment of the court, 'had some operation, since it enabled the devisee to dispose of the estate to his children, without going through the forms of a recovery; but the power, because it enabled John to make his children take by purchase, did not make it imperative on the court to give the estate to the children by purchase, in all events, and to confine them to life estates as tenants in common.' I state that from the argument in *Jesson v. Wright* (2 Bligh. O. S. 11), which case appears to me to be a clear authority for the same proposition, that a mere power to divide amongst issue will not control the general doctrine. The devise there was 'to William Wright for life, and from and after his decease, unto the heirs of the body of the said William lawfully issuing, in such shares and proportions as he, the said William, should appoint, and for want of such appointment to the heirs of the body of William, share and share alike, as tenants in common, and, if but one child, the whole to such only child, and for want of such issue over.' The next case is that of *Croly v. Croly* (Beatty, 1), where the devise was 'to the use of my younger son Richard, for and during the term of his natural life, and from and after his decease to the use and behoof of his issue male or female, in such proportion or proportions as he shall think proper, by his last will and testament to devise the same.' That was held an estate tail in the first taker; it shows strongly that a mere power of appointment will not cut down the estate tail to a life estate. I find it impossible to distinguish it from the case before the court. Then there are two cases in the Exchequer here, *Irwin v. Cuff* (Hayes, 30); *Briscoe v. Briscoe* (ib. 34). *Irwin v. Cuff* was a devise in trust for 'Henry Irwin for life, without impeachment of waste, and from and after his decease, in trust for such of his issue male and their issue male as he should by deed or will appoint, and in default of such issue, over.' That was held an estate tail in Henry; and Baron Pennefather then threw doubt on *Hockley v. Mawbey*. *Briscoe v. Briscoe* was very much to the same effect.

* * * I must allude to another case of great importance here, not only as being strong in itself, but because it applies the doctrine to personal property—that is *Simmons v. Simmons* (8 Sim. 22), where the will was of all the testator's real and personal property to Gwin Simmons, upon trust, 'That he shall dispose of all, or any of my property as he shall deem best for the benefit of my dearly beloved daughter, Elizabeth Simmons, to whom I leave all during her life, for her separate use upon her own receipts, and free from the debts, control, and interference of any husband in case she marries; at her decease she shall be at liberty to will the same to her issue as she may think fit; but in case of her dying without issue, over to

other parties." The Vice-Chancellor held that that gave an estate tail in the freehold, and an absolute interest in the personalty which was devised in the same will; that, however, is of no consequence, for it is settled, that words, not only in the same will, but in the same clause, may receive a different construction with regard to personalty and to reality. * * * With only such a context, as we have in this will, to affect the words of limitation, the general doctrine of the cases, from *Doe v. Applin* down to *Simmons v. Simmons*, appears to establish that the mere power of appointment will not control the original devise. *Merest v. James* (1 Bro. and Bing. 484), turns on the introduction of additional words, giving the estate over, if the issue die under twenty-one. On the whole I think that here a general failure of issue was contemplated. That, without the power of appointment, it would have been a clear case of an estate tail; and that the introduction of those words is not sufficient to alter it."

WILL.—Cancelling will—Removal of first sheet—Intestacy.—[*Williams v. Jones*, 38 L. Obs. 333.]—Where a testator obtained his will from the custody of his executor, and placed it in a bureau and locked it up, and upon his death the first sheet, conveying the estate in trust and disposing of the real estate, was missing, and there was no suspicion of its destruction by other parties—held, that it amounted to a cancellation of the will, and the court refused probate, and pronounced the deed intestate (*Williams v. Jones*, 38 L. Obs. 333). The court held that the will had been cancelled by the testator, as the sheet removed conveyed all the estate in trust and disposed of the real estate. There was no suspicion of its having been destroyed by any other person, and the court would, therefore, presume that it was destroyed by the deceased. The court, therefore, pronounced against the will.

NEW COUNTY COURTS.

New trial—Interpleader.—It is said to have been held in one of the new county courts that the court has no jurisdiction to grant a new trial, under sect. 89 of the act, in the case of an interpleader under sect. 118. In the *Jurist* (vol. xiii. pt. 2, p. 354) this decision is controverted. The circumstances of the case had nothing very peculiar, as it appears to us; however, they may be shortly stated as follows:—

An insolvent trader, at a meeting of his creditors, authorised three of them to sell his effects, being his stock in trade, and divide the

money amongst his creditors equally, in proportion to their respective debts. The authority was verbal only; but the insolvent left his house and shop, and gave possession thereof to the parties authorised to sell the effects. They advertised them for sale in the public newspapers, and A. agreed to purchase them by private sale. For the purchase-money he gave a joint and several promissory note, of himself and an approved surety, payable four months after the date. Possession of the effects was given to A.; he hired the house and shop, was rated, and carried on there his trade. Shortly afterwards one of the creditors sued the insolvent in the county court, and obtained execution, and the bailiff seized some of the effects purchased by A., who thereupon gave notice to the bailiff of his claim, and the question was brought before the court under the 118th sect. of the act. Evidence of the facts above-mentioned was given. A. had not obtained a legal receipt for his payment, and therefore he procured for the trial a receipt on stamp, signed by the three persons authorised to sell the effects, and this receipt was also produced in evidence. The bill or note was not produced, but one of the witnesses said it was in his possession at home. On this evidence, the judge thought the transaction suspicious, and held that the sale to A. was not *bond fide*. On the following court-day A. applied for a rehearing of the case, under the 89th section of the act; but the application was refused, on the ground that the court had no jurisdiction to grant a rehearing of an interpleader summons. On the merits of the question, whether the evidence showed the sale to be *bond fide* or not, we do not purpose here to comment; but the question is, whether the ruling of the court as to the construction of the 89th and 118th sections of the act was not altogether incorrect. No words can be larger than those of the 89th section. "Every order and judgment," says the first part, "shall be final," except as excepted. There is nothing to show that the word "order," or "judgment," refers to any particular kind of proceeding; but whatever order or judgment the court has jurisdiction to make shall be final, subject to the exception; and the exception is, that in *every case whatever* the judge may order a new trial. Now, unless anything turn on the word "trial," as not applicable to the proceedings under the 118th section, it is clear that the court must have power to order a new trial under that section, as well as in any other case, since the decision pronounced under it by the court is certainly either a judgment or an order. Indeed, the judge is expressly required by that section to make an order. The clause directs that the judge shall *adjudicate* upon the claim made, and make such order between the parties in respect thereof, &c., as to him shall seem fit. If the word "trial" could have any peculiar technical meaning under the act, possibly it might be said such a hearing

is not a trial, as by a *trial* is generally understood a jury trial. But, as the causes under the act are not all jury causes, that cannot be the sense of the word "trial" under the act.

JOINT STOCK COMPANIES WINDING-UP ACT.

The last session of Parliament produced an amended "Joint-Stock Companies Winding-up Act," (12 and 13 Vic. c. 106), some of the provisions of which we now propose to notice. Sect. 1 extends the 11 and 12 Vic. c. 45, to all partnerships, associations, and companies consisting of not less than seven members. It enacts, that notwithstanding anything in the 11 and 12 Vic. c. 45, contained importing a more limited application thereof, the same shall apply to all partnerships, associations, and companies whereof the partners or associates are not less than seven in number, whether incorporated or unincorporated, and whether formed or subsisting before or after the passing of the said act or this act, other than and except railway companies incorporated by act of Parliament, to which companies such act shall not apply: provided always, that upon the hearing of any petition for the dissolution of any such partnership, association, or company, the court shall, in considering the necessity or expediency of any such dissolution, or the terms or special directions subject to which it may think fit to allow such dissolution, have regard to any articles of partnership or other contract which shall be subsisting between the members of such partnership, association or company. It then contains provisions as to mines in the Stannaries Court, or conducted on the "Cost-Book" principle. Sect. 2 provides that the petition for dissolution, &c., shall be advertised in newspapers, besides the advertisement in the *Gazette*. Sect. 3 and schedule give a short form of affidavit verifying the petition. There are then some provisions as to the duties, remuneration, &c., of the official and provisional manager, &c. As to *contributories*, it is provided by sect. 9, that the word "contributory" shall include *alleged* contributories, so far as respects the attendance before the Master, and representation of parties, and the determination of questions of law, or of fact, &c., arising in or about the winding-up. Sect. 18 provides, that as between the contributories or *alleged* contributories, the lists of contributories, and all other lists required by the said act, as the same shall have been prepared by the official manager, and before the same shall have been settled by the Master, shall, except so far as the Master shall otherwise direct, be *prima facie* evidence of the truth of all matters

herein contained and purporting to be therein recorded. By sect. 27, the powers of inclusion, or exclusion, may be exercised so long as any shares remain unadjudicated on, and that although the party may have already been included, or specially excluded, as respects any *other* share, &c. Section 28, repeals sect. 84 of 11 and 12 Vic. c. 45, and the Master is to make *calls* on contributories for the time being on the list, and to have regard to any probable default of payment, and to fix the amount of call per share accordingly. Sects. 29 and 30, enable the official manager to *compound* claims, &c., of unascertained amount, and to prove against the estate of *bankrupt or insolvent contributories*, and receive dividends. If the creditors of the company also prove, the dividends payable to the official manager are to go among those creditors; if any such creditor be the petitioning creditor under the fiat, the dividends to be received by him, are to be set against dividends payable to the official manager. Sects. 30 and 31 relate to the *Masters*, who are to have powers to order special juries, new trials, and *interpleaders*. Sects. 33 and 34 relate to *rehearings* and *appeals*, and they provide, that rehearings before the Lord Chancellor, or any order of the Master of the Rolls, or of a Vice-Chancellor, shall not be had after the expiration of three weeks from the making of the order. An order is not to be reversed on appeal for want of form only. By sect. 17, the *Master* may review any of his own orders and proceedings. There are some provisions as to evidence. Thus, by sect. 19 the Master may require any evidence to be given which might have been obtained in a suit by the company. To facilitate the acquisition of evidence, it is provided (sect. 20), that the district commissioners of bankruptcy, and the county court judges in England, and the commissioners of bankrupt and assistant barristers in Ireland, and in certain cases the Vice-warden or registrar of the Stannaries Court are to be commissioners for receiving evidence. And (sect. 21), the Master may order the examination of persons in *Scotland*, whether contributories to the company or not, as to the estate, dealings, &c., of or with such company. By sect. 23, summonses of witnesses from England are to be good in *Ireland*, and *vice versa*. By sect. 24, affidavits &c., may be sworn in Ireland, Scotland, or the Colonies, before any competent court or person. The present act, (which does not extend to Scotland, (sect. 38) unless where named), is to be cited (sect. 39) as "*The Joint Stock Companies Winding-up Amendment Act, 1849*;" and is to be taken and construed (so far as practicable) as a part, (sect. 38) of the Joint-Stock Companies Winding-up Act, *i.e.*, the 11 and 12 Vict. c. 45. The act received the royal assent on the 1st. of August, 1849, on which day, therefore, it came into operation.

MISCELLANEA.

The education of a lawyer.—In an article in the *Jurist* (v. XIII, pt. 2, p. 285) approving of the appointment of Mr. Justice Talfourd, it is said: "The business of a lawyer is not merely to know the law, but to do that much more difficult thing, to perceive and explain correctly its application to the ever-varying circumstances that exist in the business of the world. A mere lawyer is, for all purposes of business, almost useless. Then, if that be so, the question is, how are the qualities that are essential to the formation of the accomplished and practically useful counsel best acquired and strengthened? Judgment, knowledge of mankind, clearness of apprehension, and perhaps, above all, the faculty of expressing with the lips, not only with clearness, but with persuasive influence, that which the mind comprehends—these are among the essential qualities of the counsel and advocate. How are they best acquired and strengthened? Is it by a sickening devotion to the single pursuit of legal knowledge—by storing the memory till it is overloaded with legal reading, and exercising only those functions of the intellect which are called into play by purely technical disquisitions; or is it not rather by supplying the mind from time to time with fresh ideas, fresh objects of thought—studies which, being a change, invigorate and refresh, while they inform and enlarge? Can any man say that he will read one of the higher poets, or, if science be to his taste, that he will possess himself of the knowledge of any branch of it, and not by such intellectual exercise so strengthen his general faculties, so enlarge his circle of thought, that he will be, not a more learned, but a better lawyer—better in the sense, that what learning he possesses he will better wield; that what opinion he can form he will better express? If the matter rested upon reasoning, the conclusion would, we think, be clear, that, provided a man does not so spread and extend his pursuits as to fritter away his mental strength, by passing from subject to subject without possessing any, the greater the extent of his general knowledge—the greater the polish of his mind, by the pursuit of either art or literature—the more accomplished, the more useful will he be as a lawyer. But this conclusion does not rest on reasoning alone; it is supported by facts."

Incorporated Law Society.—The council of the Incorporated Law Society are said to have no power [*quære*, will] to allow clerks in attorneys' offices in London, on giving satisfactory references, paying an introductory fee and an annual subscription, and signing rules, to read, but not take away, the books of the library in the Law Institu-

tion. Such admissions are confined to the articulated clerks of *members*, and this is said to be very reasonable (38 Legal Obs. iii.).

Debtor and creditor arrangement act—Petition—Practice.—In a petition under the 7 & 8 Vict. c. 70, the time of contracting the debt must be specified, or the petition will not be entertained; as under the second section the commissioner can only proceed if it appear that at the time of contracting the debt the petitioner had reasonable probability of paying the same (*anon.* 38; L. Obs. 334). Mr. Commissioner Fane said, that a debtor not being a trader within the meaning of the statutes relating to bankruptcy, might, under the 7 & 8 Vict. c. 70, with the concurrence of one-third in number and value of his creditors (testified by their signing his petition), present a petition to the Court of Bankruptcy with a view to a private arrangement of his affairs. Upon the presentation of such petition one of the commissioners is, under section 2, privately to examine into the matters of the said petition, and if he shall be satisfied that the debts have not been contracted without reasonable probability at the time of contract of being able to pay the same, the commissioner is directed to take certain proceedings in order to carry the petition into effect. The commissioner, however, cannot form a judgment as to the reasonable probability of the petitioner at the time of contract to pay the debt, unless such time of contracting the liability is specified in the petition. In all cases, therefore, where such is not done, I must decline to proceed. The concession to the debtor, under this act, of avoiding publicity, should only be extended to cases where the inability to meet the debt is attributable to misfortune, and not to a case where there has been misconduct in the debtor's contracting the debt without reasonable probability at the time of his being able to pay the same.

Assizes—Maiden assize—Judges' white gloves.—Mr. Baron Alderson, on the 7th August last, on charging the grand jury at Croydon, said: "That it gave him at all times great pleasure to meet the gentlemen of the county of Surrey, but it did so particularly on the present occasion, because, according to the rule and custom of the kingdom, he was entitled to a pair of white gloves by reason of there not being any capital charge on the calendar. This fact was satisfactory to him, and at the same time was most creditable to the county, for nothing was more desirable than that the criminal calendars of every county should exhibit an absence of charges of a heinous and capital character. Upon the present occasion it was gratifying to see that the calendar was very light, and the offences, with one or two exceptions, were of a trifling character."

The late Justice Coltman.—Chief Justice Wilde, at the close of his address to the grand jury at Aylesbury, on the 11th July last, said: "I cannot conclude without expressing the real grief of my

heart in this day discharging the duties which lie before me, when I remember the care, and anxiety, and judgment with which my brother Coltman would have fulfilled her Majesty's commission in this county, and with so much honour to you and credit to the bench. He, indeed, let me say, was well esteemed and highly beloved by all who knew him, as much so as any of those servants of her Majesty who have presided in a court of justice. I think it due to his memory to say, although he was a man who did not seek conspicuous and distinguished notoriety, that he was most remarkable for impartial judgment, and high legal knowledge and attainment. So sensible, indeed, was he of the sound administration of justice in this land, and so upright and honest was his judgment, that never was Mr. Justice Coltman found to swerve. And that judgment was so matured and trained, as always to be open to the force of reason; and most particularly has he displayed the striking difference between firmness and obstinacy, so much so as always to give the fullest confidence in his deliberations. I cannot say that his brethren derived more assistance from him than from any other person on the bench; but his highly cultivated judgment has tended so much to their assistance as to render their decisions greatly respected, and satisfactory to the country and the legislature. To this Mr. Justice Coltman added an amenity of manner that endeared him to all around; and I may say, without at all meaning to deteriorate from the merits of those learned persons who adorn the bench, that there is not a judge holding her Majesty's commission whom Providence might have taken away from us, who would be more regretted and revered than him whose loss we now deplore. Gentlemen, I have expressed to you my own feelings. I feel that I could not have fulfilled the duties of this day without doing so; and I trust I need ask at your hands no excuse for having detained you by these allusions to so estimable a man."

Joint-Stock companies—Winding-up Amendment Act.—We have elsewhere noticed this act, and we now present the following observation on s. 1, from an article in the *Jurist* (vol. xiii., pt. 2. p. 318). The writer says: We have understood that doubts are entertained whether certain orders, obtained on petitions presented under the Winding-up Act, 1848, can be acted upon since the passing of the 12 & 13 Vict. c. 108, on the ground that they relate to companies to which it is declared, by the act of 1849, that the act of 1848 shall not apply. We cannot conceive what ground there can be for any doubt in the matter. The old Winding-up Act was, as to certain companies, viz., railroad companies, thought at first not applicable. It was afterwards decided, by the highest court but one, that it is applicable; and that decision is now under appeal in the highest court. That the language of the act is free

from ambiguity it would be too much to assert, when a learned and peculiarly acute judge has put on it a construction different from that which is present in its received construction, and when eminent counsel have thought it advisable to carry the question beyond the court of the Lord Chancellor: Still, the act of 1848 must speak for itself; it was the law till the 1st August, 1849, and whatever companies it embraced, according to its true construction, were, if brought in due form within its operation before the 1st August, 1849, lawfully subjected to the effect of its clauses. What, then, has the act of 1849 done? It enacts, that "notwithstanding anything in the act of 1848 contained importing a more limited application thereof, the same shall apply to all partnerships, associations, and companies, whereof the partners or associates are not less than seven in number, whether incorporated or unincorporated, and whether formed or subsisting before or after the passing of the said act or this act, other than and except railway companies incorporated by act of Parliament, to which companies such act shall not apply." And it further enacts, "that this act shall be taken and construed, so far as practicable, as a part of the Joint-stock Companies Winding-up Act, 1848." The effect of this is, not to put a construction on the act of 1848, but to enlarge or repeal it *pro tanto* for the future. The act of 1849 does not purport to enact that the act of 1848 shall be construed to exclude railway companies, but that it shall not apply to such companies; so that if it did or does, according to its true construction, apply to railway companies, so far its powers are repealed, and, from the 1st August, 1849, cease. But if its provisions do, according to their true construction, extend to and include railway companies, then, although they are from the 1st August, 1849, repealed, there is nothing in the act of 1849 to deprive them of their force antecedently to the 1st Aug., 1849; and consequently it is, as it seems to us, perfectly clear that anything duly done under them before that date is not, by the act of 1849, nullified.

Provisions of the new bankruptcy act.—We have already (see pp. 225, 226) given a short statement of the principal new provisions of the recent Statute for Consolidating the Bankruptcy Law, and we now give another statement, extracted from one of our contemporaries. The following (it is said) may be enumerated as the principal changes which will be effected by it:—The fiat is abolished, and in its place a petition for adjudication of bankruptcy is substituted (sect. 4). Such petition is to be filed in the bankruptcy courts (sect. 90); in the commissioners of which a primary jurisdiction is vested, while there is to be only an appellate jurisdiction in the Vice-Chancellor and Lord Chancellor (sect. 12). Stamps are to be imposed on documents used in bankruptcy proceedings, in lieu of direct payment by fees (sect. 48). Execution against the goods and chattels of the

bankrupt, so as to be protected, must be by seizure *and sale* (as well as *bonâ fide*, before filing of petition, and without notice of prior act of bankruptcy) ; while, as against his lands, it is sufficient if executed by seizure only (sect. 133). Leave of the court is required for the assignees to commence or defend an action at law, and to defend a suit in equity, as well as to commence such suit (sect. 153). Outstanding debts of the bankrupt may, after a certain time, be sold by the assignees, under the order of the court (s. 188). A bankrupt is not to be liable upon any promise to pay a debt from which he has been discharged by his certificate (s. 204). Private arrangements between debtors and creditors may be carried out under the superintendence and control of the court (ss. 218—223). A clear distinction is made between the honest and the fraudulent debtor, by enabling an insolvent trader, under certain circumstances, to wind up his affairs without the stigma of bankruptcy, and by empowering the court to grant either a first class certificate, which declares the trader's inability to pay his debts to have arisen from misfortune only ; or a second class, in which it is declared to have arisen partly from misfortune ; or a third class, in which it is declared not to have arisen from misfortune (Ib., sect. 198, and schedule Z). Increased facilities are given for the service of a notice of debt whereon to found an act of bankruptcy (sect. 78). The time for appearance of a debtor summoned before the court is reduced from fourteen days to seven (sect. 80). Voluntary petitions are restricted, by requiring debtors applying for them to shew that they are able to pay 5s. in the pound (sect. 93). Judges' orders, as well as warrants of attorney and cognovits, are to be filed (sect. 137) ; and in certain cases are to be wholly void (sect. 135). The assignees and the creditors who have proved are to be deemed judgment creditors for the whole amount of proof and the separate proofs respectively ; and the court, having refused further protection to the bankrupt, or having refused or suspended his certificate, may grant a certificate of such proofs, upon which a ca. sa. may be issued either by the assignees or any of such creditors, and the bankrupt, if arrested thereon, cannot be discharged under a year, except by order of the court (sects. 257—259). The number of London commissioners is to be reduced from six to four, and the courts are to sit daily throughout the year (except on certain named days) for the despatch of business (sects. 7, 10).

Framing acts of Parliament.—We rejoice to see the subject of improvement in the mode of preparing acts of Parliament taken up by so powerful a pen as that of Lord Brougham. Possibly, now, some attention may actually and really be paid to it. Many people wonder how is it that acts of Parliament are worded in language so obscure and so often contradictory and many more solve the difficulty by throwing the whole blame upon the lawyers. "It is," they say,

"the lawyers in and out of the House who contrive to have acts of Parliament made obscure, in order that the profession may profit by the litigation generated by that very obscurity." The wonder should be, on the contrary, that acts of Parliament (seeing the process they go through) are ever intelligible at all; and the truth is, as to the share of the lawyers in the matter, that, whether they do or do not profit by the obscurity of acts of Parliament, they are so far from being the causes of it, that to them is due the little light which occasionally glimmers through an act. The obscurity of acts of Parliament results principally from two causes: firstly, the structure of legislative language; secondly, the parliamentary practice of altering detached parts of a bill without reference to the rest, and not subjecting the whole bill afterwards to the general consideration of any skilful and responsible person. The principle of the structure of legislative language will be perceived, by any one who may take the pains to examine a few acts, to be to adopt always the most inverted form of phrase that the subject will admit of, and to proceed always, if possible, by way of negation of the opposite of the affirmative enactment intended, instead of by the simple affirmative enactment. How this came to be the pet structure of legislative language we know not, but so it is, and the consequence is, of course, a style unnecessarily involved, and carrying in itself an unnecessary principle of obscurity.

Trusts executed and executory.—From the very recent work of Messrs. White and Tudor, being "*A Selection of Leading Cases in Equity, with Notes*," we take the following statement as to trusts executed and executory:—"A trust is said to be *executed* when no act is necessary to be done to give effect to it, the limitation being originally complete; as where an estate is conveyed or devised unto and to the use of A. and his heirs, in trust for B. and the heirs of his body. A trust is said to be *executory* where some further act is necessary to be done by the author of the trust, or the trustees, to give effect to it; as in the case of marriage articles, and as in the case of a will where property is vested in trustees, in trust to settle or convey; in both which cases a further act, viz., a settlement or conveyance is contemplated. It is now clearly established, as laid down by Lord Talbot in *Lord Glenorchy v. Bosville*, that a court of equity, in cases of *executed trusts*, will construe the limitations in the same manner as similar legal limitations. If, for instance, an estate is vested in trustees and their heirs, in trust for A. for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of A.'s body, the trust being an executed trust, A., according to the rule in *Shelley's case*, which is a rule of law, will be held to take an estate tail, (see *Wright v. Pearson*, 1 Eden, 119; *Austen v. Taylor*. Id. 361; *Jones*

v. Morgan, 1 Bro. C. C. 206; *Jervoise v. The Duke of Northumberland*, 1 J. and W. 559, clearly over-ruling the opinion expressed by Lord Hardwicke in *Bagshaw v. Spencer*, 2 Atk. 577, when he erroneously reversed the decision of Sir Joseph Jekyll, M. R. See also *Boswell v. Dillon*, 1 Dru. 291). In cases, however, of *executory trusts*, where, according to Lord Talbot's observation in *Lord Glenorchy v. Bosville*, something is left to be done, viz., the trusts are left to be executed in a more careful and more accurate manner, a court of equity is not, as in cases of *executed trusts*, bound to construe technical expressions with legal strictness, but will mould the trusts according to the intent of the creator of the trusts. It is observed, by Lord Talbot, in *Lord Glenorchy v. Bosville*, that the rule is not generally true, that in articles and executory trusts (meaning executory trusts in wills) different constructions are to be admitted. This is correct with the qualification or distinction, that, in executory trusts under marriage articles, the intention of the parties may fairly be presumed *à priori* from the nature of the transaction; in executory trusts in wills, it must be gathered from the words of the will alone. Lord Eldon seems to have denied this distinction in the *Countess of Lincoln v. the Duke of Newcastle* (12 Ves. 227, 230); but see his explanation in the case of *Jervoise v. the Duke of Northumberland* (1 J. and W. 574). The distinction has been well put by Sir W. Grant, M. R., in *Blackburn v. Stables* (2 Ves. and B. 369). "I know," observes his honour, "of no difference between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention, which must be wanting in the latter. When the object is to make a provision, by the settlement of an estate, for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the court decrees a strict settlement, in conformity to the presumable intention; but if a will directs a limitation for life, with remainder to the heirs of the body, the court has no such ground for decreeing a strict settlement. A testator gives arbitrarily what estate he thinks fit; there is no presumption that he means one quantity of interest rather than another—an estate for life rather than in tail or in fee. The subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given; but if it is clearly to be ascertained from anything in the will, that the testator did not mean to use the expressions which he has employed, in their strict proper technical sense, the court, in decreeing such settlement as he has directed, will depart from his words in order to execute his intention." In *Lord Deerhurst v. the Duke of St. Alban's* (5 Madd. 260), Sir J. Leach,

W. C., observes, as to the distinction between marriage articles and a will, ' You are guided to the meaning of articles by the plain object of consideration in them, the issue of the marriage ; but you know nothing of the motive and object of a will but what you collect from the language of it ' " (see also *Maguire v. Soullly*, 2 Hog. 118; *Stratford v. Powell*, 1 Ball and B. 25).

THE NEW BANKRUPTCY ACT.

(Continued from p. 263.)

Costs.—With respect to costs, it is by sect. 249 provided that the court may in all matters before it award such costs as to such court shall seem fit and just ; and in all cases in which costs shall be so awarded against any person, it shall and may be lawful for such court to cause such costs to be recovered from such person in the same manner as costs awarded by a rule of any of the superior courts at Westminster may be recovered, and that the like remedies may be had upon an order of such court for costs as upon a rule of any of the said superior courts for costs. By sect. 250 every person summoned to attend before the court as a person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, shall have such costs and charges as the court in its discretion shall think fit ; and every witness summoned to attend before the court shall have his necessary expenses tendered to him in like manner as is now by law required upon service of a subpoena to a witness in an action at law.

Offences against the bankrupt laws.—We are now arrived at some of the most important provisions in the act, namely, those relating to acts of a bankrupt which either will prevent his having a protection, or a certificate of conformity, or will be ground for suspending it. This is by sect. 256, which provides that if at the sitting appointed for the last examination of any bankrupt, or at any adjournment thereof, it shall appear to the court that the bankrupt has committed any of the offences hereinafter enumerated, the court shall refuse to grant the bankrupt any further protection from arrest ; and if at any sitting or adjourned sitting for the allowance of the certificate of any bankrupt it shall appear that he has committed any of such offences, the court shall refuse to grant such certificate, or shall suspend the same for such time as it shall think fit, and shall, in like manner, refuse to grant the bankrupt any further protection. The offences

referred to are : *First.* If the bankrupt shall, after the issuing of the fiat or filing of the petition for adjudication, or within two months next preceding, with intent to conceal the state of his affairs, or to defeat the objects of the Law of Bankruptcy, have *destroyed* any book, paper, deed, writing, or other document relating to his trade, dealings, or estate. *Second.* If the bankrupt shall, with the like intent, have kept, or caused to be kept, *false books*, or have made false entries in, or withheld entries from, or wilfully altered or falsified, any book, paper, deed, writing, or other document relating to his trade, dealings, or estate. *Third.* If the bankrupt shall have contracted any of his debts by any manner of *fraud*, or by means of false pretences, or shall by any manner of fraud, or by means of false pretences, have obtained the forbearance of any of his debts by any of his creditors. *Fourth.* If the bankrupt shall within two months next preceding the issuing of the fiat or the filing of the petition for adjudication fraudulently, in contemplation of bankruptcy, and not under pressure from any of his creditors, with intent to diminish the sum to be divided among his creditors, or of giving an undue preference to any of his creditors, have *paid or satisfied any such creditor*, wholly or in part, or have made away with, mortgaged, or charged any part of his property, of what kind soever. *Fifth.* If the bankrupt shall, after the issuing of the fiat, or the filing of the petition for adjudication, and with intent to diminish the sum to be divided among his creditors, or to give an undue preference to any of his creditors, have *concealed* from the court or his assignees *any debt* due to or from him, or have concealed or made away with any part of his property, of what kind soever. *Sixth.* If the bankrupt shall, under his bankruptcy, or at any meeting of his creditors within three months next preceding the issuing of the fiat or the filing of the petition for adjudication, have attempted to account for any of his property by fictitious losses or expenses. *Seventh.* If the bankrupt shall, within six months next preceding the issuing of the fiat or the filing of the petition for adjudication have put any of his creditors to any unnecessary expense by any vexatious or *frivolous defence*, or delay to any suit for the recovery of any debt, or demand provable under his bankruptcy, or shall be indebted in costs incurred in any action or suit vexatiously brought or defended. *Eighth.* If the bankrupt shall, at any time after the issuing of the fiat or the filing of the petition for adjudication have wilfully prevented or *withheld the production* of any book, paper, deed, writing, or other document relating to his trade, dealings, or estate. *Ninth.* If the bankrupt shall, during his trading, have wilfully and with intent to conceal the true state of his affairs, have *omitted to keep proper books of account* ; or shall wilfully, and with intent to conceal the true state of his affairs, have kept his books *imperfectly, carelessly, and negligently.*

Assignees and creditors' judgment creditors.—We now come to the most novel provisions in the act, for the assignees, as also all the creditors who have proved, are to be judgment creditors, and to proceed as such where the certificate is refused or suspended. We think there is great room to fear that this provision will not be found to work satisfactorily, at least as respects each creditor issuing execution on his own debt. Sect. 257 enacts that the *assignees* for the time being of the estate and effects of any bankrupt, when the accounts relating to his estate shall have become records of the court, shall be deemed *judgment creditors* of such bankrupt for the total amount of the debts which shall by such accounts appear to be due from his creditors; and *every creditor* of any bankrupt immediately after the proof of his debt shall have been admitted, shall be deemed a *judgment creditor* of such bankrupt to the extent of such proof; and the court, when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall, on the application of such assignees or of any creditor, grant a *certificate* under the seal of the court, in the form contained in schedule B a. to this act annexed, and every such certificate shall have the *effect of a judgment* entered up in one of her Majesty's superior courts of common law at Westminster *until* the allowance of the certificate of conformity of such bankrupt; and the assignees or the creditor to whom, according to such certificate, the bankrupt shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a writ of execution against the *body* of such bankrupt; and the production of any such certificate to the proper officer of any such superior court shall be sufficient authority to him to issue and seal such writ, and it shall be lawful for such superior courts to make such orders and rules in that behalf as to them shall seem fit: provided always, that every such last-mentioned certificate shall be deemed to have been cancelled and *discharged* by the *allowance of the certificate of conformity* of such bankrupt from the time of such allowance; provided also, that no execution by virtue of any certificate which shall be granted to any creditors or assignees as aforesaid shall be issued, nor shall any such certificate or execution in any manner affect any estate or effects which shall come to or be acquired by the bankrupt, *after* the allowance of his certificate of conformity.

Discharging bankrupt out of execution.—By sect. 259, if any bankrupt shall be taken in execution after the refusal of protection, or after the refusal or suspension of his certificate, he shall not be discharged from such execution *until* he shall have been in prison for the full period of one year, except by order of the court: provided always, that this enactment shall not take effect until after the expiration of six months from the commencement of this act, and

then only against such persons as shall have been adjudged bankrupt under this act, and for offences committed after the commencement of this act.

Disobeying order, &c.—By s. 266, if any person shall disobey any rule or order of the court duly made by such court for enforcing any of the purposes and provisions of this act, or of any other act hereafter to be in force relating to the subject-matters of this act, or made or entered into by consent of such person for carrying into effect any of such purposes or provisions, the court may, by warrant in the form contained in schedule B b. to this act annexed, commit the person so offending to the Queen's prison, or to the common gaol of any county, city, or place where he shall be found, or where he shall usually reside, there to remain without bail or mainprize until such court, or the Vice-Chancellor, or the Lord-Chancellor, shall make order to the contrary.

Fiat improperly issued.—By sect. 267, if the debt stated by the petitioning creditor in his affidavit or in his petition for adjudication, and verified by affidavit to be due to him from any trader, shall not be really due, or if after a fiat issued, or petition for adjudication of bankruptcy filed, it shall not have been proved that the person against whom such fiat has been issued or petition filed had committed an act of bankruptcy, and was a trader at the time of the issuing of the fiat or filing of such petition, and it shall also appear that such fiat was issued, or that such petition was filed, fraudulently or maliciously, the court shall and may, upon petition of the person against whom any such fiat or petition was so issued or filed, examine into the same, and order satisfaction to be made to him for the damages by him sustained.

Reckoning time.—By s. 276, in all cases in which any particular number of days is in any article prescribed, or shall be mentioned in any rule or order of court which shall at any time be made under this act, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday, Monday or Tuesday in Easter week, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusive of that day also. By s. 277, the act is to extend to aliens and denizens.

CASES OVER-RULED, DOUBTED, ETC.

[Continued from pp. 5—8, 93—95, 216.]

Rae v. Baker (Carth. 6), over-ruled; *Reg. v. Charleton*, 2 Ir. L. Rep. 50, Q. B.

Wheelwright v. Jackson (5 Taunt. 109), observed upon; *Hely v. Hicks*, 3 Ir. L. Rep. 99, Ex.

Desprey v. Mitchell (5 Mad. 87), not followed; *Lilly v. Stafford*, 3 Ir. L. Rep. 300, Q. B.

Kempston v. Saunders (12 B. Moo. 44; S. C. 2 C. and P. 366), observed upon; *Maguire v. Goddard*, 3 Ir. L. Rep. 306, Q. B.

Smith's Case (1 East, P. C.; S. C. 2 Bos. and Pul. 127), questioned; *Brady v. Reg.* 4 Ir. L. Rep. 21, Q. B.

Edwards v. Kelly (6 M. and Sel. 204), commented on; *Bull v. Collier*, 4 Ir. L. Rep. 116, C. P.

Brandling v. Barrington (9 B. and C. 475), observed upon; *Murphy v. Leader*, 4 Ir. L. Rep. 139, Q. B.

Evans v. Brown (1 Esp. 169), questioned; *Mowlds v. Power*, 4 Ir. L. Rep. 163, Q. B.

Connor v. M'Carthy (Batty 643), and *Roe v. Pierce* (2 Camp., N. P.) questioned; *Frewen v. Ahern*, 4 Ir. L. Rep. 185, Ex.

Stoddart v. Palmer (3 B. and C. 2); *Purcell v. M'Namara* (9 East 157), observed upon; *O'Loughlin v. Fogarty*, 5 Ir. L. Rep. 61, Ex.

Grant v. Ellis (9 M. and W. 113); and *Daniel v. Bingham* (4 Ir. L. Rep. 285), observed upon; *Daly v. Bloomfield*, 5 Ir. L. Rep. 65, Q. B.

Resolutions of Lord Coke approved of; *Coppinger v. Bradley* (5 Ir. L. Rep. 274, Q. B.).

Scott v. Nelson (a case in 1 Roll's Abr. 104), disapproved of; 5 Ir. L. Rep. 212, Q. B.

Knox v. Kelley (1 Dru. and W. 542) commented on; *Geraghty v. Abbot*, 8 Ir. L. Rep. 60, Ex.

Burchall v. Ballamy (5 Burr. 2693), over-ruled; *Crean v. Crean* (2 F. and S. 10), observed upon; *O'Driscoll v. M'Cartney*, 9 Ir. L. Rep. 570, Ex.

Ball v. Gordon (9 M. and W. 345), disapproved of; *Southey v. Magan*, 10 Ir. L. Rep. 250, C. P.

Sweetapple v. Jesse (1 W. Saunders, 227, note 1; 5 B. and Ad. 31); and *Harris v. Goodwin* (2 Scott, N. C. 467), commented on; *Barry v. Cambie*, 6 Ir. L. Rep. 49, Ex. Ch.

Williams v. Leper (3 Burr. 1886), commented on; *Fennell v. Mulcaly*, 1 Ir. L. Rep. 434.

Drue v. Baylie (1 Freeman, 402), approved of; *Kelly v. Shaw*, 1 Ir. Jur. 292, Q. B.

Hart v. Hopkins (6 Q. B. 937), approved of; *Mac Evers v. Berkeley*, 1 Ir. Jur. 299, Ex.

Willis v. Newham (3 You. and Jer. 518), considered and approved of; *Murtagh v. Crawford*, 1 Ir. Jur. 14, Ex. Quære, if the rule in *Willis v. Newham* be applicable to the 3 & 4 Will. 4, c. 27, In re Commissioner of Wide Streets, Cork, 1 Ir. Jur. 9: [per Smith M. R.]

Trimleson v. Kemmis (9 Cl. and Fin. 777), commented on; *Parsons v. Purcell*, 1 Ir. Jur. 213, Q. B.

Conway v. Nall (1 Com. B. Rep. 643), as to notice of bankruptcy being insufficient: no notice was taken of s. 22 of 5 & 6 Vict. c. 122; see *Green v. Laurie*, 11 Jur. 997; S. C. 1 Exch. Rep. 335; 17 Law Journ., N. S., Exch. 71.

Doe d. Egremont v. Forwood (3 Q. B. Rep. 627, 636) that invalid second lease is surrender of prior good one, may be considered over-ruled by *Doe d. Biddulph v. Poole*, 12 Jur. 453, and *Doe d. Egremont v. Courtney*, 12 Jur. 455.

Jarman v. Orchard (Skinner, 528; S. C. Salk. 346; Shower's P. C. 199) as to premises and habendum in the deed, explained in *Goodtitle v. Gibbs*, 5 Barn. and Cres. 718.

Mellows v. May (Cro. Eliz. 874), as to void lease being a surrender of prior lease, wrong, *Doe d. Biddulph v. Poole*, 12 Jur. 453.

Radcliffe v. Fursman (3 Bro. P. C. 514) as to production of privileged documents, observed on in *Pearse v. Pearse*, 11 Jur. 53; S. C. 1 De Gex and Sm. 12; 16 Law Journ., N. S., Ch. 153.

Richards v. Jackson (18 Ves. 472), as to production of privileged communications, observed on in *Pearse v. Pearse*, 1 De Gex and Sm. 12; S. C. 16 Law Journ., N. S., Chanc. 153; 11 Jur. 53.

Robinson v. Newdick (3 Meriv. 43) as to service of order for rehearing staying enrolment of decree, observed on in *Groom v. Stinton*, 11 Jur. 895; S. C. 2 Phill. 384; 17 Law Journ., N. S., Ch. 1.

Whitley v. Gough (2 Dyer, 140, b), as to surrender of lease by acceptance of another though for a shorter period, explained in *Doe d. Biddulph v. Poole*, 12 Jur. 453.



NOTES OF RECENT LEADING CASES.

COMMON LAW.

COMPOSITION.—1. *With creditors*—*Favouring one creditor to induce him to execute composition deed*—*Recovering back goods so given*—[*Hely v. Hicks*, 3 Irish Law Rep. 92].—Where a composition deed is executed generally by a body of creditors, no single creditor who is a party to it will be permitted to take to himself a benefit or advantage beyond that which the other creditors are to enjoy. If, therefore, a creditor sues upon a security for money, given to him in pursuance of a private agreement between him and his debtor, the authorities are uniform, that it is a valid defence to the action to show that the security was given in order to secure to the particular creditor a *bonus* beyond that which was provided for all the creditors by the composition deed. And if the security so given be a negotiable security, and is placed in the hands of a *bond fide* holder for valuable consideration, so that the debtor when sued upon it cannot resort to this defence as against himself, it has been decided that the debtor may institute an action, and recover from his creditor the money which he has been thus compelled to pay to the third party on that security (see *Wells v. Girling*, 4 Moo. 78; S. C. 1 Brod. and Bing. 447; *Alsager v. Spalding*, 4 Bing. N. C. 407; *Smith v. Bromley*, 2 Douglas, 695, note; *Smith v. Cuff*, 6 Mau. and Selw. 160). In the principal case it was decided that the same principle applies in the case of an *executed* contract, *i. e.*, where money is paid down or goods delivered to the creditor to induce him to sign the composition deed. There the plaintiff, a trader, having become embarrassed in his circumstances, proposed to his creditors to compound their debts for 6s. 8d. in the pound. The defendant, one of the creditors, refused to accede to the composition, unless, prior to his signing the deed, he received goods to the value of 3s. 4d. in the pound. The plaintiff gave to the defendant goods to the amount required, and the defendant, in consideration, signed the composition deed. Held, that the plaintiff was entitled to recover from the defendant the amount for which the goods so delivered were sold by the defendant (*Hely v. Hicks*, 3 Ir. Law Rep. 92, Ex.) It may be observed that the court much doubted the correctness of the decision in *Wheelwright v. Jackson* (5 Taunt. 109), but said perhaps it might be distinguished, as there the treaty for the composition had been entirely broken off.

2. *Favouring creditor to induce him to sign composition deed*—*Bill of*

exchange—[*Lindsay v. Rogerson*, 8 Ir. Law Rep. 179.]—The observations on the previous case will have put the reader in possession of the principle upon which this case was decided. It appeared that A. being indebted to B. in a large amount, and greatly embarrassed, called a meeting of his creditors, at which B. refused to attend, or to sign any composition deed, unless a part of his debt was secured to him. A. accordingly drew a bill on C. for £150, which C. accepted, and at the same time wrote a letter to B., authorising him to sign the composition deed, without prejudice to the security of C., which B. then held, namely, the bill for £150; immediately after B. signed the composition deed, annexing to his signature the words, "Without prejudice to C.'s securities he held." Held, that these words were not sufficient to put the general creditors on inquiry as to what such securities were; and that as the bill was given by C. to B. as a consideration for his signature to the composition deed, B. could not recover on this bill against C. (*Lindsay v. Rogerson*, 8 Ir. Law Rep. 179, Ex.)

DILAPIDATIONS. — *Clergyman — Removing old barn—Non-repair of buildings not affixed—Opening and using gravel pits*—[*Huntley v. Russell*, 13 Jur. 837.]—In this case, which was an action on the case for dilapidations against the executors of a deceased rector and vicar, where it appeared that the land of the rectory consisted of four acres adjoining to the rectory-house, and 100 acres a mile and a half distant from it; and that a barn near the rectory house had fallen down, and the rector had built another on the 100 acres, larger and more convenient for the land, but without a faculty or license from the bishop for that purpose: It was held—First, that the removal of the old barn, and building the new one, was not waste for which defendants were liable in this action. Secondly, that defendants were not liable for the non-repair of buildings which were not fixed to the freehold. **Second count**, in the nature of waste, for digging gravel-pits in land of the rectory, and getting gravel from them, and not levelling the ground afterwards. **Plea**, no waste: Held—First, that under this plea defendants might show that the gravel-pits had been opened by the surveyors of highways, and that gravel was taken by them for the highways. Secondly, that defendants were not liable for the original opening of the gravel-pits by the surveyors, nor for the taking of such gravel as was used for the highways, nor for the omission of the rector to compel the surveyors to slope down the ground, in pursuance of sect. 31 of stat. 13 Geo. 3, c. 78; but that they were liable for gravel sold generally by the rector, the gravel-pits not having been used for getting gravel for sale generally before his incumbency (*Huntley v. Grant*, 13 Jur. 837). *Per Lord Denman*: "The questions arise not on any counts charging waste,

bat on the ordinary counts for not repairing, stating, however, that the deceased incumbent had removed buildings, and had not rebuilt them. If the strict doctrine as to waste is to be applied to these counts, the pulling down a barn and building another, even on the same farm and on a more convenient site, at the distance of a mile and a half, might be considered waste, as destroying the evidence of identity. That doctrine has been laid down in the cases of particular tenants, because there is no person who has the inheritance in reversion; but, the fee simple of the glebe being in abeyance, the incumbent is, in truth, but tenant for life, and he or his executors are no doubt liable for any waste committed. But to constitute waste there must be either, first, a diminishing of the value of the estate; or, secondly, an increasing the burthen upon it; or, thirdly, an impairing the evidence of title (*Doe. d. Grubb v. the Earl of Burlington*, 5 B. and Adol. 507). Much more must one of these three requisites exist in an action on the case for dilapidations. Now, in this case, none of the three requisites exist. The new barn on the 100 acres is more convenient and beneficial to the estate; and the evidence of title could in no way be affected by the taking down a barn adjoining the house, that house being still standing. It was urged, that a faculty or license from the bishop was necessary. It would be desirable and proper that such a license should always be obtained; but we do not find any rule of law which makes it necessary."

DISTRESS.—*Time for replevyng—Computation of time*—[*Robinson v. Waddington*, 13 Jur. 537].—In computing time the rule is that where a certain space of time is given to a party to do some act, which space of time is included between two other acts to be done by another person, both the days of doing these acts ought to be excluded in order to insure to him the whole of that space of time. This rule was established in *Lester v. Garland* (15 Ves. 247), and confirmed in *Young v. Higgon* (6 Mees. and Wels. 49, 54); *Mitchell v. Foster* (12 Adol. and Ell. 472; S. C. 5 Jur. 70), and over-ruling *Castle v. Burdett* (3 Term Rep. 623). In conformity with this rule it has lately been decided (and see 1 Mag. N. S. pp. 245, 246) that in reckoning the five days within which, by sect. 2 of stat. 2 Will. & M. sess. 1, c. 5, the tenant or owner may replevy goods distrained upon for rent, the day of distress and the day of sale are both to be excluded (*Robinson v. Waddington*, 13 Jur. 537).

SURETY.—*Discharged by creditor's signing composition for original debt—Composition*—[*Grundy v. Meighan*, 7 Ir. Law Rep. 519].—If a debt secured by the collateral undertaking of a surety be released or satisfied, the engagement of the surety is at an end, the extinguishment of the principal obligation necessarily involving in it the discharge of the surety. The maxim is *Reo liberato libe-*

tantur fidejussores. And this is so where the creditor compounds with his debtor without the assent of the surety, and precludes himself from suing upon the original obligation for the original debt. And even any enlargement of the time of payment by a binding contract which ties up the hands of the creditor, and prevents him from suing the principal debtor upon the original obligation will have this effect (see *Orme v. Young*, Holt's N. P. C. 84; *Coombe v. Woolf*, 8 Bing. 162; *Isaac v. Daniel*, 8 Queen's Ben. Rep. 500). Of course the creditor may effectually prevent this from ensuing by obtaining the surety's assent, and even where the surety's assent has been obtained he may yet be discharged on the ground that the retention of his liability unknown to the other creditors is a fraud. There may, however, be a reservation in the deed of his rights against the surety; but this should be explicitly given, for a mere reservation by the creditors of his "additional securities," or "without prejudice to any security," will not suffice (see *per* *Ld. Eldon* in *Boulton v. Stubbis*, 18 Vesey, 20; and see *Eyre v. Hollier*, 1 Cas. temp. Plunkett, 250). The following case will exemplify these observations: There in an action against the defendant, as drawer of a bill of exchange, it appeared that the bill in question, with others, had been drawn by defendant upon, and accepted by D., to secure a debt due by D. to the plaintiffs. D., having become embarrassed in his circumstances, and a commission of bankruptcy having issued against him, called a meeting of his creditors, who signed an agreement to accept a composition of 7s. 6d. in the pound, to be secured by the drafts of D. on the defendant. The plaintiffs, and other creditors of D., who signed the composition agreement, annexed to their respective signatures a reservation in the following terms: "Without prejudice to any additional security we may hold." It further appeared, that the arrangement, with respect to the composition, was entered into with the knowledge and concurrence of the defendant, and that the plaintiffs, at the time of signing the agreement, held no other security for the debt so due by D. than his said acceptances of the defendant's drafts. Held that, notwithstanding the reservation annexed to their signature, the plaintiffs, by signing the agreement for a composition, had discharged the defendant from his original liability, as surety upon the bills, so drawn by him, and accepted by D., and to secure the debt of the latter (*Grundy v. Meighan*, 7 Ir. Law Rep. 519, Ex.)

EQUITY.

COHABITATION BONDS.—*Particeps criminis*—*Demurrer in equity*—[*Benyon v. Nettlefold*, 13 Jur. 798.]—It is clearly established that all agreements, bonds, and securities given by a man as the price of future illicit intercourse with a woman, are void both at law and in equity (1 Fonbl. Equity, b. 1, ch. 4, s. 4; *Princ. Com.*

Law, 58; Princ Eq. 63). And it used to be considered that the circumstance that the relief was asked by a party who was *particeps criminis* was not material, for the instrument could only be set aside on his application. But in the principal case the V. C. of England has decided otherwise. In that case the bill, which was for discovery in aid of a plea of immoral consideration, pleaded by the plaintiff in equity to an action upon a covenant entered into by him for the payment of an annuity to the plaintiffs at law upon trust for one Caroline N., stated that the deed of covenant was valid on the face of it, but that the consideration for it was "a prospective illicit cohabitation, and improper connexion subsequently had," between the plaintiff in equity and Caroline N., but that the connexion had been since altogether discontinued—demurrer for want of equity by one of the plaintiffs at law allowed (*Benyon v. Nettlefold*, 13 Jur. 798). *Per* V. C. of England: "In the first place I would observe, that there appears to me no substantial distinction between a court of equity administering relief by way of relief, and interfering on the application of a plaintiff, by compelling the discovery which he asks. Technically speaking, there is, of course, a distinction between relief and discovery, but the real principle is the same. Shall the court be set in motion to give relief? Shall it be set in motion to compel the discovery? And my opinion is, that the very principle which would restrain the court from giving relief would also restrain it from giving discovery. It is unnecessary, in such a case as this, to go back to a number of cases; but taking the latest case referred to, *Sisney v. Eli* (13 Jur. 480), there it appeared, that although there was originally an immoral purpose, yet the party who filed his bill to be relieved had wholly receded from it, having become convinced of the full immorality of that purpose, and that there had never, in fact, been done that act in contemplation of which the deed was executed. In that case, therefore, the plaintiff filed his bill in the situation of a person who had intended to do something immoral, and to a certain extent illegal, and yet refrained from doing it; and who, before he committed the crime, changed his mind, and asked to be relieved. In *Smyth v. Griffin* (13 Sim. 245), it appears the party actually had accomplished the bad purpose to which the deed was made auxiliary, and then there was a bill filed for relief against it, and the demurrer was allowed. The language of the Master of the Rolls, in *Batty v. Chester* (5 Beav. 103; see p. 109), appears to me perfectly intelligible. He, in effect, says that a court of equity would relieve against a deed given for an immoral purpose, provided circumstances exist which would constitute a ground for relief, exclusive of the bad conduct of the party who asks for relief. A man may have had an illicit purpose, which he may have accomplished, but still, if there are other grounds besides on which this

court would interfere, the court will interfere on those grounds, but will not interfere when the party who claims the relief shows that he himself has participated in the very moral guilt which it was the object of the deed to procure. That is my interpretation of his lordship's words. In this case there is no doubt what is the real construction of fact, because the bill states, "that the indenture is valid on the face thereof," &c. It is perfectly plain that the man has participated in the very evil which the deed was intended to produce; and my opinion is, that it is a case in which this court ought not to interfere to compel a discovery, which may more or less tend to show that his plea at law is good."

INFANT.—*Day to show cause—Infant heir of mortgagor*—[*Hutton v. Mayne*, 3 Jon. and Lat. Ir. Rep. 586.]—In the case of *Price v. Carver* (3 Myl. and Cr. 157), Lord Cottenham held that a decree of foreclosure against an infant must give the infant a day to show cause against the decree, after he attains 21, notwithstanding the provisions of the 11 Geo. 4 and 1 Will. 4, c. 47, ss. 10, 11. In this case the legal estate was vested in the infant, and a conveyance from him, therefore, was necessary. This decision was followed by the M. R. for Ireland, in *Clibborn v. Forstall* (5 Ir. Eq. Rep. 531), but in this case the legal estate was in the mortgagee, and no conveyance from the infant was necessary—a distinction not attended to by the Master of the Rolls. The decision there was that a decree of foreclosure and sale against the mortgagor and against an infant entitled under a settlement of the equity of redemption to the first equitable estate tail in remainder, must give the infant a day to show cause. It was also held that if a decree against an infant give him a day to show cause, the court will not, before the day given, order him to execute a conveyance to the purchaser under the decree. However, this case must be considered as over-ruled by the principal case. There lands were mortgaged in fee, subject to which the equity of redemption was settled in strict settlement. The first tenant in tail was a minor. It was held that in a decree for a foreclosure and sale, at the suit of the mortgagee, a day to show cause ought *not* to be given to the mortgagee. Where the decree is for an immediate sale, and no conveyance of the legal estate is required for a minor defendant, the decree ought not to give him a day to show cause (*Hutton v. Mayne*, 3 Jon. and Lat. 586). *Per* Sir E. Sugden, L. C.: "This is a foreclosure suit by a legal mortgagee, who is also assignee of some family charges; the equity of redemption is in an infant, as tenant in tail under a settlement by the mortgagor. The decree is to be for a foreclosure and sale, as usual in this court; and the only question is whether the infant shall have a day to show cause. I have once more looked through most of the authorities. As the infant has only an equity, and the decree is

for an immediate sale, it appears to me that he should not have a day to show cause. The plaintiff can make a good *legal* title; and the equitable estate of the infant will be bound by the decree. The sale is for his benefit."

CONVEYANCING.

DEED.—*Operation under the statute of uses—Election to so operate—Title of executors*—[*Haigh v. Jagger*, 18 Law Journ., N. S., Exch. 125.]—This is an extremely important case upon the doctrine, that where a deed may operate either at the common law, or under the statute of uses, the party has an election to take it either way. It is still more important, as showing that an instrument may operate as a lease, though it has no certain term expressed, notwithstanding the rule laid down in the books that "a lease for years must be for a time certain, and ought to express the term, and when it should begin, and when it should end, certainly." To an action of trespass for breaking and entering a coal mine, and carrying away the coals, the defendants pleaded, setting out a deed made between J. S. of the one part, and Joseph, Matthew, and James J. of the other part, whereby J. S. granted, bargained, sold, and confirmed to Joseph, Matthew and James J., their executors, &c., all the coal mines, veins, and seams of coal of J. S. under his closes (naming them), with full and free liberty to them, their executors, &c., at all times during the term thereby granted to dig for and get the same in a fair and workmanlike manner, that in consideration of £420, paid by them to J. S. by yearly instalments until the end of twelve years, they should have the liberty of sinking pits on the said closes for getting coals at any times thereafter during the terms thereinbefore granted; that J. S. granted to Joseph, Mathew, and James J., their executors, &c., that they, their executors, &c., should enjoy the liberty for getting coals at any time or term of years, computing from the time of their beginning to sink until six acres should be gotten, and at the expiration of the term of twelve years, the quantity of six being not then gotten, to have liberty to get the remainder, and when all the coals were gotten to the quantity of six acres, the business of getting coals to be carried on until such time as all the coals in the closes were gotten, paying £70 per acre, &c. Averment, that Joseph, Matthew, and James J. entered generally into the coal mines, that they won and dug the six acres before the expiration of the twelve years; that Joseph J. died, that James J. also died, and devised all his estate in the said coal mine to Robert, James, and William J., whom he appointed his executors, and that they as such devisees elected to take the aforesaid estate by way of use under and by virtue of the statute for transferring uses into possession, and then elected that the said indenture should operate and enure under the said statute, whereupon they became entitled to the said coal mines.

for the residue of the said term. The plea then alleged an entry of the plaintiffs under colour of a certain demise upon the coal mines, whereupon the defendants, there still remaining eighteen acres of the coals unworked, as the servants of the said executors, entered the said coal mine and dug and carried away the said coals; Held, assuming the grant or the indenture to be a bargain and sale by way of use, that to make it operate under the statute of uses an election to that effect was necessary, and that to render such election valid, it must have been made not by the executors, but by the bargainees themselves, the survivors or survivor, and, therefore, that the plaintiffs were entitled to judgment. *Quære*, whether under the present grant, the original parties having discontinued working, their executors could, after a considerable lapse of time, again enter as if they were the termors, until the whole of the coal had been gotten (*Haigh v. Jaggard*, 18 Law Journ., N. S., Exch. 125).

The case had been before the court on a former demurrer (see 16 Mees. and W. 525; S. C. 17 Law Journ., N. S., Exch. 110). The plea as it was then framed contained no averment of any election to treat the deed as operating under the statute of uses, and not as a common law conveyance; and the court in that case gave judgment for the plaintiffs, on the ground that the indenture amounted to a demise for twelve years only, and that even assuming the subsequent part of the deed to amount to a grant, by way of easement, of the right to get the rest of the coal, still that was a grant to the said three lessees without any words of inheritance, and so it became inoperative on the death of James, the survivor of the three. It was then argued on the part of the defendants, that the deed might operate as an instrument, to take effect under the statute of uses, to give a good estate to the executors of the surviving lessees in the whole of the coal to be gotten; but the Court of Exchequer held that no such point could be made in the then state of the record, inasmuch as there was no averment of the lessee having elected to take by way of use, which, upon the authorities it was considered necessary to have done in order to raise such a point. The authorities referred to were Co. Litt. 42, a., n. 7, Hale's MSS.; Rosse's Case, Moor, 556 for defendant. For the plaintiff as to averment, Sir R. Heyward's Case, 2 Coke's Rep. 35, and Miller v. Green, 8 Bing. 92; S. C. 1 Law Journ., N. S., Exch. 51, were relied on. The court permitted the defendants to amend their pleas, in order that they might raise the question by showing that the lessees had, in fact, elected to take under the statute of uses. Accordingly, the plea was amended by introducing an averment that the devisees of James J. elected to treat the deed as operating under the statute of uses. The Court of Exchequer decided that this averment did not entitle the defendants to judgment in their favour. *Per* Pollock C. B.: "We will assume

for the purpose, at all events of the present case, that a bargain and sale to three persons, their executors and administrators, of the right of the coal under certain lands, would be good by way of use to give to the bargainees and their executors a right to enter on the mine, and take the coal till all should have been gotten. The former case, however, decided that the grant of the indenture in question, even if it could be constrained as a bargain and sale by way of use, certainly might also be taken as a common law grant, and that in order to make it operate under the statute of uses an election to that effect must have been made; and we think such election to be valid must have been made, not by the executors, but by the parties themselves, or the survivors or survivor. The reason of this is, that after the death of the survivor all interest in the deed, treating it as a grant at common law, was at an end. The election must be made while there is the power of making the choice, and this cannot be done at all when one of the two things between which the choice is to be made has become impossible. It is idle to say that the executors of the survivor elected to take under the statute; they had no choice to make; they could not take otherwise, or if they took at all it would only be because the leasees, under whom they derived a title, and who had a choice to take on either of the two modes, exercised it so as to give a right to the executors without any election whatever upon their part." It should be noticed that the reports of the former decision are erroneous in making Mr. B. Parke use the words, "These words would convey that interest only," &c., which should be, "These words would give the chattel interest only.

WILL.—Revocation—Misdescription of referred to will—[*Thompson v. Hempenstall*, 13 Jur. 814.]—G. D., by his last will, "revoked all former wills, codicils, and testamentary dispositions, except a will bearing date the 13th December, 1831, which will relates exclusively to the reversion in fee of the Tong Castle estate." One of his former wills bore date the 13th December, 1831, but did not relate exclusively to the reversion of the Tong Castle estate. Another former will bore date the 22nd May, 1839, and did relate exclusively to that reversion in fee: Held, that the reference, taken with the whole context of the three wills, and with the evidence of the state of the testator's family, clearly designated the will of the 22nd May, 1839; and that the will of the 13th December, 1831, was not entitled to probate (*Thompson v. Hempenstall*, 13 Jur. 814).

NOTICES OF NEW BOOKS.

GOLDSMITH'S EQUITY.

The Doctrine and Practice of Equity ; or a Concise Outline of Proceedings in the High Court of Chancery : designed principally for the use of Students. By G. GOLDSMITH, A.M., of the Middle Temple, Barrister-at-Law. Fourth edition. London: W. Benning and Co.

The present, which is the fourth, edition of Mr. Goldsmith's work, presents a marked improvement, arising, however, chiefly from an enlargement to the extent we should suppose of more than one-third in matter. The third edition contained less than 300 pages, whilst the one before us has more than 400. This enlargement we consider a very judicious step, as it was impossible to present any very useful summary of equity principles, together with the pleadings and practice, in so small a space. It may even be doubted whether a much more considerable extension would not have been judicious: but of course Mr. Goldsmith must be the best judge of this.

The book has only just reached our hands, so that we have not yet had an opportunity of examining every portion of it, but we can say, from what we have perused, that it appears to us to be in general correct and trustworthy. We observe, too, that many recent cases have been noticed, and many references made to the *Law Times*, which will be a convenience to many possessing that work. We have said that "in general" the work is correct, for we have noticed a few errors in the parts we have perused. Thus, Mr. Goldsmith (Intro. xvi., xviii., n.) speaks of *twelve* Masters (including the Master of the Rolls), whilst it is pretty well known that there are only *ten*, excluding the Master of the Rolls, who practically can hardly be deemed a mere Master in Chancery. Counting this judge as one, still there are but *eleven*. Again (p. 312), the messenger is *not* sworn before a Master, and we may observe that since the discontinuance of a Master's attendance at the public office, affidavits and oaths are made at the affidavit office, or before a record clerk, or the clerk of enrolments. At p. 297, it is said that the defendant may plead that the plaintiff is excommunicated, and that the plea must be certified by the ordinary, &c. Now by a statute in the reign of Geo. 3, an excommunication does not affect a party's civil capacity in any respect, and it certainly cannot be a good plea that the plaintiff is excommunicated. We were not aware (p. 389) that costs could be recovered in equity

by a *capias ad satisfaciendum*, but as the same assertion is made in the third edition of Mr. Goldsmith's work, we presume we are wrong, though we can find no authority for the proposition, or any form of the writ. At p. 327, it is said "the defendant after answer is allowed one order only for leave to amend in the usual form; and afterwards no further leave will be granted before filing or undertaking to file his replication, unless the court shall be satisfied by affidavit that the draft of the intended amendments has been settled," &c. Now any one reading this would suppose that the application to amend must be made to the court, whereas it has been decided that it must be to the *Master*. Mr. Goldsmith is not to blame: he has only stated the order as it stands, but we wonder he did not call attention to the point. To any one reading pp. 248, 249, we would say, bear in mind that the examination of a witness *de bene esse* may, and, indeed, usually does, take place without a bill to perpetuate testimony being filed. The phrase, "a bill to perpetuate the testimony of witnesses, to examine witnesses *de bene esse*" (p. 248), if it has any meaning at all, conveys a very erroneous notion. Many of our readers will readily understand this. Though we have thus called attention to a few defects, we may say that they are but as spots on the sun, and by no means detract from the general utility of Mr. Goldsmith's work. We should notice that particular attention has been paid to the subject of parties to sue and to be sued, which will be found useful alike to the practitioner and to the student. We think this a very judicious amelioration, for we find most chancery works defective in this matter. We now present an extract from that part of Mr. Goldsmith's work which relates to the parties to a suit, which will better enable the reader to form a proper opinion of the work than any comments of ours. We give the references in the body, which in the work are to be found in the foot notes.

"Usual practice respecting parties to a suit.—It has been somewhat quaintly said that 'a court of equity delights to do complete justice, and not by halves (Knight v. Knight, 3 P. Wms. 333);' and thus, for the purpose of doing this complete justice between all the parties interested in the suit, and to pronounce such a decree as will prevent future litigation, and protect the interests of those who are called upon to obey its decree, it demands that all persons materially interested, however numerous, shall be made parties to the suit, unless where it is impracticable to bring them all before the court; as if one or more of the persons who are interested in the subject of the suit are out of the jurisdiction of the court, in which case, proceedings may be had without such persons against all the others. But it is the practice to add the name of a person out of the jurisdiction to the bill, in order that his interests may appear in connec-

tion with the other parties on the record; and the bill prays process against him, should he come within the jurisdiction of that court (Mitford, 164); and where it appears by the bill that the plaintiff *resides* abroad, the defendant may, by making immediate application, as soon as he has gained information of the fact, obtain an order for the plaintiff to give security for costs, and that he may not be forced to answer until a certain time has elapsed from the plaintiff giving the security required; and if the fact of the plaintiff residing abroad come to the defendant's knowledge in the course of the cause, he may apply at any time, provided he has not waived his right by any subsequent proceedings (*Weeks v. Cole*, 14 Ves. 518). But no such order will be allowed where there are co-plaintiffs residing in England (*Walker v. Easterby*, 6 Ves. 612).

"Exceptions to the general rule.—The court, however, for the purpose of saving expense, delay, and the inconvenience of a multitude of suits by persons claiming similar equities, will sometimes permit a few persons out of a larger number to file a bill on behalf of themselves, and all others in the same interest (*Cockburn v. Thompson*, 16 Ves. 321; *Evans v. Stokes*, 1 Keen, 24). Thus, in the common case, where a few creditors institute a suit on behalf of themselves and all other the creditors of their debtor deceased, the decree being made for the general benefit of such creditors, all the others who are not made actual parties to the bill may come in under the decree, and claim satisfaction out of the real and personal estate of the deceased, equally with those creditors in whose name the bill was filed. In the same manner a legatee may substantiate proceedings in equity on behalf of himself and the other legatees. It has been also held that one of the shareholders of a canal is at liberty to file a bill on behalf of himself and the rest of the shareholders, for the purpose of setting aside an agreement entered into by the commissioners of the canal, contrary to the provisions of the act of Parliament under which the canal was made (*Gray v. Chaplin*, 2 Sim. and S. 267). Generally speaking, however, where the equity of the bill touches any particular person, so as to obtain from him a benefit, or fasten upon him a duty, he is a necessary party (*Calvert's Par. to a Suit*, 16, 2nd edit.).

"Principles upon which the court decides the question as to parties.—In determining the question as to the proper parties to a suit, the court proceeds upon the two leading rules: the one is, that no decree shall be binding upon any one who is not considered by the court either as a party, or as one claiming under a party to the suit (*Daniell's Prac.* 390; *Smith v. Effingham*, 7 Bea. 371); and it may be laid down, as a general principle, that all persons who have in the object of the suit an interest apparent upon the record are necessary parties (*Calvert's Par. to Suits*, 13). The other rule is, that when

a decree is once made, it shall provide for all the rights of the several parties interested in the subject of the suit. This principle of doing complete justice is peculiar to a court of equity.

"In reference to the relaxation of the ancient rules of the court, by allowing a number of persons to be represented by a few having a mutual interest in the subject of the suit, Lord Cottenham said, that he thought it 'the duty of the court to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy' (Taylor v. Salmon, 4 My. and Cr. 141).

"*Rules relating thereto.*—Where, under the circumstances above referred to, some persons are allowed to institute a suit on behalf of themselves and others, the principal objects to which attention must be directed, as it regards the plaintiffs, are the following:—'1. That it must appear upon the record that the persons represented by the plaintiffs are numerous; 2. That the objects of the suit are beneficial both to the persons represented, and also to the plaintiffs on the record; 3. That they all have a community of interest in all the objects of the suit; 4. That all the persons interested are, personally, or by representation, before the court (Calv. 44.).'

"*Another reason for relaxing the general rule.*—Another reason for relaxing the general rule is, where suits are allowed to be instituted against certain persons on behalf of others as well as themselves (Adair v. New River Company, 11 Ves. 444); and then the general principles to be attended to in this form of suit are the following:—'1. That the persons against whom the proceedings are taken are too numerous to be brought before the court; 2. That there are defendants on the record, who will fairly and honestly try the right, and will respectively maintain all the several interests which are adverse to those of the plaintiffs; 3. That the rights in issue are in the nature of general rights (Calv. 53).'"

OKE'S BOOK-KEEPING.

An Improved System of Solicitors' Book-keeping, with Forms of the several Books, and a Practical Exemplification of their Working, and Division of Profits or Losses in Cases of Partnership, Directions for Posting, Balancing, &c. By GEORGE C. OKE, Solicitor's Accountant, author of "The Magisterial Synopsis." London: H. Butterworth.

The title of this work speaks for itself, and is well calculated to

arrest the attention of those solicitors who do not keep their accounts in a proper manner, and their name is truly *legion*. It would appear incredible, were it not too well known, that solicitors should pay so little attention to the keeping of their accounts. Every solicitor would find it add not only to his comfort but to his character to keep correct accounts, which, of course, involves in it the immediate payment over of sums received on clients' accounts, which, under the present system, or rather no-system, are frequently so mixed up with the solicitor's balance at his banker's, as to leave him unable to say exactly what is his own. To old practitioners, who have pursued this method for many years, we fear Mr. Oke's book will have no charms, but to the young practitioner we would recommend its purchase, and if he will follow out its directions, he will, we are sure, always consider that the trifling cost of the book was the best money he ever laid out.

Mr. Oke, in the Preface, observes :—

"The manuscript of which the present little work is comprised was prepared by me in the year 1844, solely for my own assistance and use, and has from time to time undergone correction and revision as experience suggested, especially immediately after the publication of 'Foster's Double Entry Elucidated,' 3rd ed. 1847. The system here given is, therefore, based upon unerring principles, and is simple in its form and working, without giving an unnecessary number of complicated columns for the insertion of the figures; a mode, however satisfactorily and efficiently it may be applied and approved for works of reference or summaries, is not adapted for the practical working out in detail of books of accounts.

"I may be allowed to allude to some of the features and parts of this work peculiar to solicitor's accounts, which, with full directions for posting, balancing, dividing profits, &c., this compilation is intended to ascertain and show in a shorter time than usual, and which other published systems cannot give or show so practically or simply: they are—

"The receipts and payments, or profits and loss, on bills of costs paid.

"Amount owing to the business upon bills of costs delivered and unpaid.

"Amount owing on cash accounts distinct from bills of costs.

"The total amount of business done during a given period, and the payments on account thereof or thereout."

Respecting the value of the double entry system, Mr. Oke observes in his Introduction—

"The system usually adopted in solicitor's offices is that by single entry, which is a very unsafe and unsatisfactory one, especially in cases of partnership; but, on the contrary, the two-fold arrangement of the same items by the double entry system gives the means of

checking and verifying the accounts one against another, the nature of which proof in the latter system is so highly appreciated. In most instances the entries in the 'general ledger' appear twice over, once in a collected form in the 'business' account, and separately against each particular client or debtor. The double entry system also enables the solicitor to ascertain his real worth, or net capital by two distinct processes; the exact agreement of which constitutes a satisfactory and independent proof that the accounts are correctly adjusted, viz. :—

" 1. If from the total amount of assets you deduct the liabilities, the difference will be his actual worth.

" 2. If to the original capital you add the net profit, or deduct the net loss, the result will be also his actual worth.

" Mr. Foster in his very able work on double entry, says (p. 3), ' In the classification and adjustment of accounts by this system property is regarded as a whole, composed of various parts; the capital account exhibits the whole capital, taken collectively; the cash, personal, and business accounts exhibit the parts of which the capital is composed. Hence there must necessarily and inevitably be a constant equality between the capital account on the one hand, and all the remaining accounts on the other.' "

COVENANTS RUNNING WITH INCORPOREAL RIGHTS.

It is considered in our text-books as doubtful, whether or not a covenant can run with a rent-charge or other mere incorporeal hereditament or right. Mr. Platt (*Covenants*, p. 475) says, that a covenant for payment of a rent-charge, being a personal covenant and collateral to the land of the grantor, will not affect an assignee (see also 9 *Jarman's Convey.* 344, 345, 3rd edit.). But some authorities point to a different conclusion (*Brewster v. Kidgell*, Salk. 198; 12 *Mod. Rep.* 166; *Holmes v. Buckley*, 1 *Eq. Cas. Abridg.* 27, A. and K). And it has certainly been decided as to tithes, that a covenant may run with them (*Bally v. Wells*, 3 *Wilson*, 30). There, however, the court expressly said that they could see no difference between land and tithes: " tithes is a tenth part of the profits of the land, and is land itself." It must be remembered, too, that rent may be reserved by lease for tithes as for land, which shows the nature of tithes to be different in this respect from other incorporeal rights, or at least, different from a rent-charge. The two following Irish cases will show how the courts in Ireland act with respect to the opinion that a covenant will not run with a rent-charge. The

first case is the Earl of Egremont v. Keene. (2 Jones's Ir. Exch. Rep. 307). There, A. by deed demised to B. for 31 years, reserving a rent, all that and those the customs of the fairs and markets of the town of E.; and B. for himself, his heirs, executors, and administrators, covenanted with A., his heirs and assigns, that he, his executors, and administrators, would pay the reserved rent to the lessor, his heirs and assigns. It was held that an action was maintainable on this covenant *against* the assignee of B. The case was decided on the authority of an unreported case, in the King's Bench in Ireland, of Lord Lucan v. Gildea, where it was held that an action for the tolls of the town of Castlebar could be maintained by the lessor against the assignee of the lessee, in a similar demise. In a case which occurred in 1836, but has only recently been reported (Executors of Kennedy v. Stewart, 7 Ir. Law Rep. 421) it was held that a covenant to pay a rent-charge does *not* run with the rent to the assignee of the rent-charge. The action was one of covenant on a deed of rent-charge by the executors of the grantee. The defendant pleaded that the testator (the grantee) had assigned it in his lifetime. Mr. J. Crampton said, if the covenant remained in the grantee, after the assignment, it is now in his executors, and the plea is no answer to their action; but if the covenant passed to the assignee of the rent, the plea bars the present action. "On this question the case of Milnes v. Branch (5 Mau. and Selw. 411) is an express authority. The principle is explicitly laid down by Lord Ellenborough in his judgment, and though Bailey, J., puts the case on a new ground, he declares his entire concurrence with Lord Ellenborough. A dictum ascribed to Lord Holt in Brewster v. Kidgill (12 Mod. Rep. 170) was relied on; it was this: 'I make no doubt but that the assignee of the rent shall have covenant against the grantor, *because it is a covenant annexed to the thing granted.*' But as was said by Lord Ellenborough in Milnes v. Branch, this dictum was extra-judicial, and not warranted by any authority. It appears by the case itself, as reported, that Lord Holt was not supported by the opinion of any of his brethren. And I may add that the case of Brewster v. Kidgill is reported in *four* different books (1 Lord Raym. 317; 1 Salk. 198; 5 Mod. Rep. 369; and 12 Mod. Rep. 170); in three of these reports the dictum relied on is not found; it appears only in 12 Mod. Rep., a book of no great authority. We must, therefore, take the law to be that the covenant to pay the rent-charge does *not* run with the rent to the assignee of the rent-charge."

MISCELLANEA.

Criminal law digest.—In the next session Lord Brougham will attempt to pass an act consolidating the criminal law. In his late letter to Sir James Graham he says: "Since 1843, only two circumstances have occurred, which it is necessary to mention, touching the labours of the commissioners. I presented in 1844 a bill for enacting a Digest of the Criminal Law, founded upon their valuable report. Lord Lyndhurst (then chancellor) highly approved of the bill; but, considering the great importance of the subject—considering also that, from the nature of the thing, the work must be mainly executed out of Parliament, and required only to be adopted or sanctioned by the Legislature, he referred it to another commission—that is, to the same commissioners, with others added, to revise their labours. Accordingly a further report was made in 1847, and the Digest having now received a very full consideration, I again brought in a bill founded upon it, which in 1848 was referred to a select committee of the Lords. As chairman of that committee I addressed letters to all the judges of the three kingdoms, requesting their observations upon the Digest, submitting it to them, together with copies of all the reports upon which it had been founded. Waiting for the answers of these learned persons, I postponed to the next session all further proceedings with the bill. Again I presented it at the very beginning of the session just ended; again it was referred to the same select committee, and again we anxiously expected the answers of the judges. The session has, however, passed away, without any answer whatever from any of the English judges, though valuable suggestions have been communicated from those of the other two kingdoms. I conclude from this circumstance that the judges of England are, generally speaking, satisfied with the Digest, and have no corrections to offer which they deem of sufficient importance to call for the consideration of the Lords. Meanwhile the far more arduous task has been performed by the learned commissioners, of digesting into one body the whole law of procedure in criminal cases. This work, equally important and difficult, consists of 12 chapters, 47 sections, 1,180 articles. I have examined it with an admiration which I believe will be shared by every lawyer who studies it. Coupled with the former Digest of Crimes and Punishments, it gives us a complete code of the Criminal Law, and enables the Legislature of this country to escape the grave censure of not furnishing to the people the means of knowing what those laws are, which it commands them, under the heaviest penalties, to obey."

Revival of attendant terms—Doe d. Clay v. Jones.—This case, which is will be noticed, has created quite a sensation among conveyancers, and we find the following remarks upon it in the *Jurist* (v. xiii. pt. 2, p. 382). "The whole principle of the old law was, that if a puisne purchaser of an equity for valuable consideration, without notice, could any how get hold of the legal estate, it should not be taken from him. It never was pretended that it mattered at all whether the transfer to or from him of the legal estate was a breach of trust or not; nor was it ever pretended that, in general, the transfer could be other than a breach of trust, or at least a transfer inconsistent with the trust. Now, if the statute meant to abolish the principle of protection to the purchaser by getting hold of a dry legal estate, how can it matter whether the assignment of the satisfied term is to a trustee to attend the inheritance or to a trustee without saying for what purpose, or to a trustee to do therewith as he shall be directed by the person who is a puisne purchaser—in fact, a stranger to the inheritance? The act, we should have conceived, in the absence of the decision in *Doe d. Clay v. Jones*, contemplated two things that might be done with a satisfied term: the parties might wish to make it attend the inheritance, and the act says they shall not keep it on foot, although they express their desire to do so by declaring that it shall attend the inheritance; or the parties might otherwise act, and then the statute looks to see, not whether they intended the term to attend the inheritance, but whether it does do so. Now, there can be no question that a term attending the inheritance of A., being assigned to B. with notice then of A.'s estate, does, in the hands of B., whatever may be his moral equity as to the inheritance, become a term in trust to attend A.'s inheritance; and no jugglery of words can prevent such being the fact. That B. the puisne purchaser, was permitted to repudiate the right of his *cestui que* trust, and hold against him, was the privilege given to him by the old law, in regard to his equal moral equity—the very privilege which the act was certainly intended to destroy. If the case now commented upon be good law, parties, in order to keep a term on foot, have only to assign it in trust for, or to the order of, the puisne purchaser, and may so avoid the statute."

Principles of the law.—The following is taken from Mr. Lewis's Introductory Lecture in Michaelmas Term last, delivered in Gray's Inn Hall: "Undoubtedly, the theories of our law are not always determinate theories; some of them must be distinguished as *indeterminate*. Of the former class are such doctrines as these: That a limitation shall always (when possible) take effect as a contingent remainder rather than as an executory devise or shifting or future use. That a contingent remainder shall vest at the earliest possible time. That a remainder once vested shall never afterwards divest.

That an unwritten contract for land is not enforceable. That an ambiguity in the terms of an instrument shall not be corrected, but that an ambiguity arising upon matter extrinsic may. That a writing under seal cannot be altered by any act less solemn. That a mortgage so long as it continues a mortgage, is always redeemable. That a contract to exchange land for money, or money for land, converts the subject constructively, from the time of the contract. That time never runs against a trust in favour of the trustee. The *indeterminate* principles in our law, which must be distinguished and attended to in determining the measure of scientific exactness attained by our system, are such as the following : That a contract in *undue* restraint of trade is bad. That purchases from expectant heirs must not be at a *gross* under value. That after the lapse of a *sufficient* period, a person who has not been seen or heard of may be presumed to be dead. That a voluntary settlement by a party *considerably* indebted at the time, is void as against his creditors, whether present or future. That *material* alterations in a written instrument after its execution, vitiate it. That a conveyance by a trader on the eve of bankruptcy, of the *bulk* of his property otherwise than by *bond fide* sale, is fraudulent against his assignees. That a conveyance by a trader who becomes bankrupt, by way of *fraudulent* preference of any of his creditors, is void against his assignees. That a fiat in bankruptcy founded on an act of bankruptcy, of which it is *inequitable* for the petitioning creditor to avail himself for that purpose, is not supportable. Now, it must be admitted that, in respect to doctrines of the complexion of those last detailed, there is a discretionary indeterminateness, which precludes us from characterising the English law a *pure* science, even in its internal structure and arrangement. For in all such cases there is something to be decided which cannot be determined merely by reference to the principle itself, but upon which, nevertheless, the conclusion mainly depends. The criteria in such instances are necessarily fluctuating and indefinite, since it remains for the judge, in the exercise of his discretion, to determine whether (to take the first case) the *extent* to which the covenant operates in restraint of trade, is such as to offend the doctrine that a covenant so operating is void ; and this is a point which the principle does not and cannot (consistently with its own condition and character as a principle) be made competent to determine. And the like may be seen in all the other instances mentioned."

Devise of reversionary interests.—In the last number of the *Law Magazine* there is an excellent article upon the "devise of reversionary interests," a subject which (as the writer observes) is, in its details, not without its difficulties, and any allusion to which in popular text books will be found, upon examination, to be extremely meagre and unsatisfactory. Where the word "reversion" is used

it will, in general, pass a fee (*Bailes v. Gale*, 2 Ves. 48). Where the reversion is not specifically mentioned, yet, in general, it passes under a general uncontrolled devise (*Rooke v. Rooke*, 2 Vern. 461); *Glover v. Spendlove*, 4 Bro. C. C. 337). Sir J. Leach in *Banckes v. Holmes* (1 Russ. 394) held that a devise of a reversion, being after a general failure of issue of the children, was too remote and void (see 1 Vict. c. 26, s. 29). This has been designated "a very strong decision" (5 Madd. R. 99; 3 Sim. 409). It may be taken for a general rule that whenever it may be collected from the general context of a will that it was the intention of the testator to dispose of his reversionary interest expectant on subsistent estates tail, such intended disposition will not be defeated by inadvertency, on the part of the testator, to adapt his language to the events on which the reversion will fall into possession. Where the reversion is the only real estate of the devisor upon which the general devise can operate, it was formerly held that though a testator uses words sufficient to carry a reversion, yet if from a subsequent clause it appears that he did not intend to devise the reversion, such interest would not pass (see *Strong v. Teatt*, 1 H. Black. Rep. 200; S. C. 2 Burr. 912; *Goodtitle v. Miles*, 6 East, 494; see 8 Ves. 256). "Upon the whole (observes the writer in the *Law Magazine*, vol. xi. N. S. 123—125), it may be justly inferred from the tenor of all the cases hitherto examined (including that of *Strong v. Teatt*, 1 H. Black. Rep. 200), that words must be allowed to have their natural legal effect; that their operation ought not to be contracted upon bare surmise or conjecture; and that the same train of reasoning which, in one class of cases, led to the exclusion of the reversion, will, in the other class, justify its being included within the scope of the testator's intention. To effectuate that intention, provided such result can be attained without, at the same time, clogging the decision with inconsistencies, is the great object which the court keeps steadily in view. At this point the doctrine underwent a very material alteration. An opinion began to prevail that more than due importance had been attached to reasoning founded upon any real or supposed inconvenience which might arise from the remoteness of the interest devised. Even a reversion expectant on an estate tail is not absolutely without value. The assumption that a testator might possibly intend that a reversion, to which some of the limitations were inapplicable, should be included in the devise, appeared certainly not more gratuitous or violent than that he should make a devise, even while at the same time he had no real estate upon which all the limitations could take effect. Accordingly, subsequent decisions gave a new complexion to the doctrine on this subject; the first being that in the case of *Church v. Mundy* (12 Ves. 426). A. having a reversion, in fee, in land expectant on an estate tail in his

brother, B., devised all his real and personal estate to his wife for life, and, if she should die, leaving no issue, then in trust for B., his heirs, &c.; and, in the event of B. not being then alive, it was to be at the disposal of the wife of the testator, who had no other real estate. Sir W. Grant held that, under these circumstances, the reversion did *not* pass, inasmuch as it could not be assumed that the testator intended to comprehend in the devise any estate, except such as his wife might take for life, and B. might afterwards enjoy; and the reversion in question, which could not fall in until the death of B. without issue, was not such estate. The grounds on which Sir W. Grant rested his opinion, that a reversion depending on an estate tail did *not* pass under the general words, were, that the estate supposed to be given to B. after the death of the wife, was one which the wife could not possibly take until after his death. It struck the Master of the Rolls that, when a man limits estates in a particular manner, he is to be understood as speaking only of such estates as may, by possibility at least, go in that manner. But, upon appeal, Lord Eldon remarked, that the question was not, whether, in the event of there being other subjects applicable, the reversion should be applied, but whether the purposes of the will being such that the subject could not be conveniently applied to them as a present interest in possession, the testator was to be considered as having attached really no meaning at all to certain clauses of his will. He could not doubt that, in this particular instance, the testator upon being asked whether, upon the supposition of his brother being alive, he meant to dispose of the reversion, he would have answered that he intended to dispose of all over which he had a disposing power. The cases illustrative of the effect of general words, as applicable to a reversion which is altogether unlikely to fall into possession, proceed upon the principle, that it is much safer to consider those subjects to have been intended which the words employed describe, than to have recourse to conjecture for the purpose of supplying some supposed deficiency. Instead of theorising upon the facility or convenience with which an intention may be effectuated, which a testator has declared shall be effectuated, the simple rule of construction is to ascribe, unless there be something in the context negating the interpretation, to the words employed by him, the extent and force which they naturally bear. It was upon this principle that Lord Eldon, in the case of *Church v. Mundy*, was of opinion that, rather than suppose that the testator had no meaning at all, the language used by him might, in the absence of any freehold estate, be safely extended in its application to the reversion of the copyhold estate. Sir W. Grant, however, adhered to the general principle which had been recognised by him, and continued to ascribe the decision of Lord Eldon to the special circumstances of the case; viz, that if the

brother had predeceased the testator—an event which was expressly contemplated by the will—the devise would, at the moment of the testator's death, have had its complete operation in favour of the wife. The Master of the Rolls admitted the validity of this reasoning, provided a condition, not expressed, were to be arbitrarily understood. That case, however, did not, according to his views, necessarily establish the point, that where A., tenant for life, with remainder to B., in tail, with reversion to himself in fee, devised to B. for life, with remainder to C., his eldest son, for life, remainder to the first and other sons of C. in tail, the reversion would pass. Cogent as was the reasoning of Lord Eldon, Sir W. Grant was inclined to think that the decision of the point against the heir-at-law left untouched the principle involved in such cases as those of *Goodtitle v. Miles* (6 East, 494), and *Welsby v. Welsby* (2 Ves. and Beam. 187). Upon the whole, it may be regarded as settled, that a reversion may pass under a general devise: and, although there appears to be other real estate to which the limitations applicable to the reversion might be referred, yet little or rather no stress seems to be laid on that circumstance: the cases have been determined on the broad ground that the property, the words of the devise being sufficient to comprise it, will pass. The fact of the testator having or not having such interest actually in his contemplation, at the time when he frames the devise, is regarded as utterly immaterial."

New Bankruptcy Act—New rules—Decisions, &c.—At the time we are writing no new rules have appeared, although the profession is anxiously looking for them. Indeed, until they do appear, it is quite impossible for practitioners to know how to act. Already there is a great outcry made against the act: "Nothing (said one of the London commissioners) could be more slovenly or bungling than the construction of many of the provisions." There have been many decisions on the classes of certificate, every one of course aspiring to the first, but the great majority hitherto have only obtained third-class certificates. One of the commissioners has decided that the penal enactments in sect. 256 are *prospective* only. Another commissioner has decided that sect. 257 as to assignees and creditors being judgment creditors, has a *retrospective* operation. A commissioner has decided that creditors may prove their debts by affidavit as formerly (see sect. 164). It has been held by the senior commissioner that he has power to *transfer* a separate fiat from the country to London, when a joint fiat is being there worked. It is said that the number of official assignees is about to be reduced; at least, a commissioner refused to appoint one on this ground.

ILLEGAL COVENANTS AND CONTRACTS.

Having in various parts of this volume noticed the subject of illegal or void covenants with respect to restraint of trade (p. 29—36); to simoniacal engagements (p. 57—63); to resignation bonds (p. 85—91); to charging benefices (p. 113—119); and to contracts on Sunday (p. 141—146), we think it will be useful to give a summary of the principal points arising out of illegal contracts or covenants.

Where a covenant which is sought to be enforced, whether it be an express or implied one, is expressly or by implication forbidden, no court of justice will give effect to it (*Selw. N. P.*, pp. 62, 63, 11th edit.). Thus, if a man covenant to pay a sum of money and interest thereon at £6 per cent. per annum, the same being charged on land, it is illegal and void. Again, if there should be a covenant to pay an annuity, that annuity being one which falls within the provisions of the statute requiring the deed to be enrolled, the covenant is not enforceable. Again, if there should be a covenant in a deed or grant to charitable uses, the want of an enrolment will be fatal to the deed, and the covenant also fails, and is not enforceable at law. These are all instances exemplifying the rule, that covenants which contravene a rule of law will not be enforced. The next rule is, that there is no distinction between a contract which is in itself void, and one which is ancillary or incidental to an illegal contract. Thus, in *Collins v. Blantern* (2 Wils. 347; see *Prole v. Wiggins*, 3 Bing. N. C. 235; S. C. 5 Jur. 1171; 8 Jur. 826), an indictment for perjury against several persons being pending, the prosecutor, Rudge, the plaintiff, and the parties indicted, agreed that the plaintiff should give Rudge his promissory note for £350, payable one month after date, for not appearing to give evidence at the trial, and that the obligors should execute a bond to the plaintiff, of the same date with the note, as an indemnity to the plaintiff for giving such note. The bond was accordingly entered into, and being put in suit, the defendant pleaded the illegality. The court held that the whole transaction was to be considered as one entire agreement; for the bond and note were both dated on the same day, for the payment of the same sum of money on the same day; that it was an agreement to stifle a prosecution for wilful and corrupt perjury—a crime most detrimental to the commonwealth—that the promissory note was certainly void; and, consequently, the plaintiff was not entitled to recover on the bond which was given to indemnify him from such

note. In the case of *Cannan v. Bryce* (3 Barn. and Ald. 179) it was held that money lent for the express purpose of settling losses on illegal stock-jobbing transactions, and so applied, could not be recovered back, although the lender was no party to the stock-jobbing. Another rule is, that although the illegality is in direct furtherance of an illegal contract, yet where the illegality consists of acts wholly *collateral*, though combined with the illegality, yet it is not void. See per C. J. Tindal, in his judgment in *Fergusson v. Norman* (5 Scott, 809; S. C. 5 Bing. N. C. 76; 3 Jur. 10).

Another rule is, that an omission out of the contract of provisions securing the observance of a statutory enactment, does not make the contract void, even though in fact there may be a violation. Thus, in *Lewis v. Armstrong* (4 Moo. and Sc. 1; S. C. in equity, 3 Myl. and Ke.) 64, the L. C. said: "If, as in the present instance, we have before us a contract of partnership wholly silent upon the statutory obligation, to make the names public over the door (pawn-brokers), we have no right to argue from the *omission* that an infraction of the law was intended; on the contrary, we are rather bound to believe that a compliance with the law, being taken for granted as a matter of course, was not expressly mentioned in the articles as being thought superfluous. If again, such a contract, legal in itself, has been made, nothing done afterwards, how illegal soever, can operate to make the contract unlawful. But where the acting of the parties is illegal—where the contract being silent, the law is broken under it, though not by force of it—there arises a very natural suspicion that the written articles, though true as far as they go, do not contain the whole truth, and that another agreement was entered into collateral to the one in writing, and to which the illegal acting may be referred."

Again, a contract may be illegal in one of its aspects, and yet the rest of the transaction may not be affected by the law which makes the one portion illegal (see *Lewis v. Davidson*, 4 Mees. and W. 654; S. C. 3 Jur. 387). Thus, is a charging of a benefice legal? So far as the contract is a covenant to pay it is enforceable, but as an express charge on the benefice it is void. You must put out of view that portion which is separable. Indeed, as to annuity transactions, the whole deed is rendered void, if not duly enrolled in cases where this is requisite, so that you cannot sue on a covenant in such a deed to pay. Again, there is no distinction with reference to illegality, on account of the instrument being under seal. What does this imply? It implies that you are at liberty to import into the case extrinsic matter. As is well known, a contract under seal (with the exception of one in restraint in trade) does not require any consideration to support it; therefore, even though a bond or conveyance should be expressed to be made on good or sufficient consideration, yet if it

be shown by extrinsic evidence to be for an illegal purpose, it will be void ; for unless the obligor were allowed to contravene it, it would be (as Lord Ellenborough observed) a means of covering fraud. See *Paxton v. Popham* (9 East, 421, 422), where Lord Ellenborough said : " It is true that you cannot add to a contract under seal anything to vary the contract ; but you may show *dehors* the instrument that such contract was entered into for an illegal purpose (see also *Williams v. Jones*, 5 Barn. and Cres. 108 ; *Gas Light and Coke Co. v. Turner*, 6 Bing. N. C. 327 ; S. C. 7 Scott, 779).

Another rule is that no distinction is to be taken between illegalities which are *mala prohibita* and those which are *mala in se* (see *Aubert v. Maze*, 2 Bos. and Pull. 371 ; *Cannan v. Bryce*, 3 B. and Ald. 179). This distinction was not always observed : thus in *Faikney v. Reynous* (4 Burr. 2069) it was said : The defence relied on as furnishing a ground of defence against being liable to pay is not *malum in se* ; it is only prohibited by this act of Parliament." Another distinction formerly supposed to exist has been repudiated. It was this : that where the purpose was to protect the revenue a violation of the provisions of the statute was an answer to an action on a contract contravening such provisions ; it was so held until so late as *Brown v. Duncan* (10 Barn. and Cres. 93). There we find the court making these remarks : " These cases are very different from those where the provisions of acts of Parliament have had for their object the protection of the public, such as the acts against stock-jobbing and the acts against usury. It is different also from the case where the sale of bricks, required by act of Parliament to be of a certain size, was held to be void, because they were under that size. There the act of Parliament operated as a protection to the public as well as to the revenue, securing to them bricks of the particular dimensions. Here the clauses of the act of Parliament had not for their object to protect the public, but the revenue only. Neither is this one of that class of cases where an attempt is made to recover the price of prohibited goods."

In *Cope v. Rowland*, 2 Mees. and W. 149, the distinction between breaches of law for revenue purposes was distinctly overruled. There the court says : " It may safely be laid down, notwithstanding some *dicta* apparently to the contrary, that if the contract be rendered illegal, it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is whether the statute means to prohibit the contract ?" We must present this to our minds : was the act in question intended to be prohibited ; if so, it will be void. The question is, was the object to secure some leading point in public policy, or was it merely designed to lay down a regulation which a penalty would be sufficient to enforce. These

points were considered in the late cases of *Cundell v. Dawson*, 44 Jur. 634; S. C. 4 Com. Ben. Rep. 376; *Smith v. Mawhood*, 14 Mees. and Wels. 452; S. C. 15 Law Journ., N. S., Exchequer, 149. In this last case it appeared that the Excise License Act (6 Geo. 4, c. 81) imposes penalties on any manufacturer, &c., of tobacco, who shall not have his name printed on his entered premises, or who shall manufacture, &c., without a license; it was held that the effect was to impose a penalty on the offender for the benefit of the revenue, but that they did *not* render void a contract for the sale of tobacco made by a manufacturer or dealer who failed to comply with their requisites. But it was also held that if the Legislature had intended to prohibit the contract itself, if only for the purposes of revenue, it would have been illegal, and no action could have been brought upon it.

Another rule is, that in determining the validity of a contract not on its face void you must look only at the intention of the parties at the time; it is of no importance to show that, in fact, there is no illegality, for if there was an illegal design at the time of the contract it is void. It is true that the parties may change their minds, and may use the matter of contract in a different manner entirely, but still the entering into the contract with an illegal intention taints it with illegality. Thus in *Langton v. Hughes* (1 Mau. and Selw. 592, cited 10 Bing. 110, and 2 Myl. and Cr. 86), where the plaintiff, a druggist, after the 42 Geo. 3, c. 38, but before the 51 Geo. 3, c. 87, sold and delivered drugs to the defendant, a brewer, *knowing that they were to be used in the brewery*, it was held that he could not recover the price of them. However, in such cases, it must be shown that the party seeking to enforce the engagement was privy to the intended illegality (see *Lightfoot v. Tenant*, 1 Bos. and Puller, 567).

Lien under illegal contract.—A party cannot claim a lien under an illegal contract as arising by that contract. Nor will the court assist him on the supposition that there may a good collateral contract: such a contract must be shown, and must be one that is enforceable. The presumption always is that there was only one binding contract between the parties on the same subject-matter (see *Ferguson v. Norman*, 5 Scott, 809; S. C. 5 Bing. N. C. 76; 3 Jur. 10).

MICHAELMAS TERM EXAMINATION QUESTIONS.

COMMON LAW.

I. State some of the causes of action at common law. II. In what cases must notice be given, and for what length of time before commencing an action? III. Mention the several times of limitation of actions by statute, and how the effect of the statute may be barred. IV. What is the rule with respect to documents to be produced on a trial before incurring the expense of calling witnesses to prove them? V. In what cases will secondary evidence be received, and what proof must be previously given? VI. What is the law now with respect to the competency of witnesses who possess an interest in the subject-matter in issue? VII. State the mode of enforcing the attendance of a witness, and the consequence of his non-attendance. VIII. In what circumstances will a new trial be granted, and when will it be granted only upon payment of costs? IX. What is now the practice where the record and the evidence are at variance? X. What is the difference between a warrant of attorney and a cognovit, and what is required to give validity thereto? XI. State the different kinds of writs of execution, and the property which may be taken under each. XII. What is the course of proceeding under the Interpleader Act? XIII. What are the steps to be taken in an action of ejectment before the cause at issue? XIV. When should an application be made to set aside an award under an order of *nisi prius* or an agreement of reference respectively? XV. In what cases is a plaintiff not entitled to costs?

CONVEYANCING.

I. Mention the difference in acquiring estates by descent and by purchase. II. Set forth the proper words for creating estates in fee simple and in tail, respectively. III. How may a joint tenancy and tenancy in common be respectively created and severed? IV. What are the usual powers of a tenant for life over the estate? V. State the practice in case a vendor is entitled to retain the title deeds, as to what the purchaser may require, and at whose expense. VI. What is understood by the term voluntary settlement? In whose favour, and on what grounds, may it be set aside? VII. What are the instances, if any, in which a bond or covenant to resign a living is deemed legal? VIII. At what place must the title deeds be produced for examination; and where the vendor and the solicitor reside at a distance from the premises, who must bear the extra expense of

the examination ? IX. In what manner can real property be settled to charitable uses ? X. What covenants should be inserted in a mortgage of leasehold houses, and particularly for the protection of the mortgagee against the covenants in the original lease ? XI. What precaution should a second mortgagee take to preserve his priority over a third mortgagee ? XII. Where a lease contains a covenant by the lessee to keep the premises in repair damages by fire excepted—what are the rights and liabilities of the lessee in case the premises are destroyed by fire ? XIII. What persons are incapable of making a will ? XIV. What is the consequence of the attestation of a will by a party interested as a devisee or legatee ? XV. Where a person dies intestate, leaving a wife, brothers, and sisters, and children of a deceased brother, how is his property distributed, and who is entitled to administer ?

EQUITY.

I. Describe the principal steps in a suit ? II. When can a cause be set down for hearing ? III. State some of the proceedings necessary to be taken in the Masters' office ? IV. How is evidence taken in the Court of Chancery ? V. What are some of the principal "Interlocutory proceedings" usually taken in a cause ? VI. When does the court grant an order appointing a receiver ? VII. How would you proceed to appeal against an order or a decree ? VIII. State the general rule as to parties to a suit ? Is the rule ever, and when, relaxed ; and to what extent ? IX. State some of the remedies afforded by a court of equity which cannot be obtained in a court of law ? X. What are the several parts of a bill in equity ? XI. What are the several kinds of bills ? XII. What are the several kinds of process in Chancery, and the mode of service respectively ? XIII. How is an appearance to be entered, and when ? and what is the mode of enforcing an appearance and an answer to a bill ? XIV. In what cases will the court grant an injunction, and what is the rule with respect to the facts which ought to be stated ? XV. State the several kinds of defence to a suit in Chancery ?

BANKRUPTCY.

I. State generally the course of proceeding under the new act for consolidating the Bankrupt Law, in order to obtain an adjudication in bankruptcy ? II. Has there been any alteration made by the new act, and if so what, in the amount of the petitioning creditor's debt to found an adjudication ? III. What are the facts which a solicitor should ascertain before applying to make a trader bankrupt ? IV. Will an adjudication in bankruptcy be granted when its object appears to be to effect the dissolution of a partnership ; or to avoid the payment of an annuity, or the performance of the covenants of a

lease; or the completion of a purchase? V. To what notice, if any, is a trader entitled before he is declared bankrupt; and when and how can he dispute the adjudication? VI. What effect has the death of a bankrupt at any, and what, time during the proceedings on an adjudication in bankruptcy? VII. What acts of buying and selling constitute a sufficient trading to support an adjudication? VIII. What instances of *selling* will not constitute a trading within the Bankrupt Law? IX. State the means by which a trader, since the abolition of arrest on mesne process, can be compulsorily made a bankrupt? X. What property in the possession of a bankrupt at the time of the adjudication does *not* pass to the assignees? XI. Within what time, and in what circumstances, are transactions with a trader, after an act of bankruptcy, liable to be set aside by an adjudication of bankruptcy? XII. What is the law with respect to the examination of the bankrupt and his wife? XIII. In what cases, and by what means, may debtors to the bankrupt's estate be required to attend the commissioners, to show cause why the debt claimed should not be paid? XIV. Is there any, and what, recent alteration in the law relating to the bankrupt's certificate? XV. What are the several kinds of appeal in bankruptcy?

CRIMINAL LAW.

I. What decisions in the quarter sessions are liable to be reviewed in any and which of the courts at Westminster? II. What power have the judges of the superior courts, and the magistrates respectively, with regard to admitting accused persons to bail? III. Is there any and what alteration in a bill or note, after it has been signed by the party, which will constitute forgery? IV. Define the offence of larceny, and state the facts necessary to be proved in support of an indictment for that offence. V. Valuable property has been found, and the finder knows the owner, and does not restore it:—is this larceny? VI. A clerk or agent renders a false account to his principal, concealing from him the knowledge of part of the money or effects received on his account;—is the agent amenable to the criminal, or only to the civil law? VII. Give a definition of the offence of embezzlement, and mention the principal facts to be proved on an indictment. VIII. In support of an indictment for perjury in an affidavit, what evidence must be adduced? IX. Will the compounding an offence, in any and what instances, subject the party effecting the compromise to an indictment, and in what instances will an indictment not lie? X. Is there any, and what, recent alteration in the law relating to accessories, and the power of trying them with or without the principal offender? XI. What steps should be taken by a solicitor retained to defend an accused person? XII. What is the mode of proceeding to procure and

carry into effect a writ of *habeas corpus*, where a person is alleged to be unlawfully detained or imprisoned? XIII. What is now the law with respect to acquiring a right to parochial relief? XIV. When and how can a public footpath be stopped or altered? XV. In what cases and to what extent is a prosecutor entitled to costs, how are they ascertained, and by whom are they payable?

NOTES OF RECENT LEADING CASES.

EQUITY.

PAWNBROKERS. — *Loans above £10 — Usury — Interest* — (*Fitch v. Rochfort*, 13 Jur. 314, 351.) — We have before (p. 152) called attention to the decisions in this case, and we will now, therefore, state the circumstances. The plaintiff deposited chattels with the defendant, a pawnbroker, as security for several principal sums, each exceeding £10, at interest after the same rate as that, by the Pawnbrokers' Act, authorised to be taken upon loans on pledge not exceeding £10, viz. 3d. per £1 per month, with written authorities to the defendant to sell, in default of payment within a twelvemonth. Each of such authorities or contracts contained a provision for payment by the defendant of any surplus proceeds of sale, after satisfaction of principal, interest, and costs to the plaintiff, "if demanded," within three years, being a similar provision to that in the Pawnbrokers' Act with reference to the proceeds of a sale under that statute of forfeited pledges. The Vice-Chancellor held the transaction to be illegal (see *ante*, p. 152). But this decision was overruled by the Lord Chancellor on appeal. His lordship in effect decided that the Pawnbrokers' Act (the 39 & 40 Geo. 3, c. 99) is confined to loans of money amounting to £10 and under, for which more than £5 per cent. interest is charged; and as, previous to the relaxation of the usury laws by the 2 & 3 Vict. c. 37, a pawnbroker might lend, in his private capacity, any amount of money at £5 per cent. interest, so now he may lend any amount of money above the sum of £10, at any rate of interest. And held, in the present case, dissolving an injunction to restrain a sale, by a pawnbroker, of pledges, to secure a much greater amount than £10, that, although the contract made upon the deposit of the goods contained all the advantages to the pawnbroker of a regular pawnbroking transaction, the contract was legal; and that, as to such a transaction, a pawnbroker is under no peculiar disabilities (*Fitch v. Rochfort*, 13 Jur. 351).

Per Lord Chancellor: "Pawnbrokers being under no disabili-

ties, except that they were obliged to conform to the provisions of this act (39 & 40 Geo. 3, c. 99) if they advance money under £10, to that extent they are on the same footing with all the other subjects of her Majesty. We have also two decisions in the Common Pleas, which show that pawnbrokers are confined to sums under £10; and we have also a judicial decision that the act applies only to transactions under £10. If so, all transactions above £10 are to be looked at just as if the Pawnbrokers' Act did not exist at all. If this act does not touch them, the old law applies. Then comes the act now in force with respect to usury, which enacts, that the usury law shall not affect any contract for a loan or forbearance of money above the sum of £10 sterling. And then, for further security, it says, that nothing therein contained shall extend to repeal or affect any statute relating to pawnbrokers, but that all laws touching and concerning pawnbrokers shall remain in full force and effect, to all intents and purposes whatsoever, as if this act had not been passed. Then, what are the laws relating to pawnbrokers? Why, they are confined to loans of £10 and under. The 2 & 3 Vict. c. 37, provides, that as to all loans under £10 pawnbrokers shall be confined to their own act; and for greater security, that act says, that all laws relating to pawnbrokers shall remain where they were. Then, if a pawnbroker before that act might advance money at £5 per cent. upon goods deposited with him, he is acting as a pawnbroker; but he is not, within the Pawnbrokers' Act, acting as such, because that transaction is especially excepted. He might lend money upon the same terms as any other person could, provided it is above £10. Now, the act says, that any person may advance money above £10, without being interfered with by the old law, and the pawnbroker is no exception to the rule of law; all persons are exempted from the operations of the usury law on loans above £10. Why, then, should pawnbrokers be excepted? They are not, in terms. There is nothing to make them liable to an incapacity which they were not under at all by the former law; and so they are not liable to any incapacity upon transactions above £10. And then, in addition to that, we have the decision of the Court of Exchequer (*Nickisson v. Trotter*, 3 Mees. and W. 130), which holds, and which you cannot otherwise hold, in my opinion, that loans on deposits above £10 are protected by the 1st section of the 2 & 3 Vict. And then we have the decision in the Court of Queen's Bench in *Pennell v. Attenborough* (4 Ad. and Ellis, 868) under circumstances identical with the present case: it is a transaction of this sort—that a special contract with a pawnbroker for a loan of above £10 is as lawful a transaction as if he was not a pawnbroker; and it seems to me perfectly clear, therefore, that the

Pawnbrokers' Act has nothing whatever to with this transaction. The transaction is just as binding as if the party advancing the money were not a pawnbroker; and as to the contract they entered into, he is merely following it up. But the question is, whether that contract was legal or illegal, and it appears to me not to be illegal, and that he is not under any disabilities by reason of being a pawnbroker."

NEW COUNTY COURTS.

New judge—North Riding.—We have much pleasure in announcing that the Lord Chancellor has appointed Mr. Serjeant Dowling to the office of judge of the County Court for the district of the North Riding of Yorkshire, vacant by the recent decease of Mr. Robert Wharton. The public services rendered by Mr. Serjeant Dowling, whilst acting as judge *pro tempore* on the Norfolk and Home Circuits, which were universally acknowledged by the profession, prove him to be eminently qualified for the discharge of the highest judicial duties, and afford the best security that the duties of the office he has now been appointed to will be ably and satisfactorily performed (39 L. Obs. 45).

Replevins.—A question of great importance has been raised as to replevins, though it does not appear to us that there can be any doubt as to the result. Should we be wrong, it will be a matter requiring much consideration in each replevin case. In the case we allude to a motion was made for a prohibition to restrain the judge of the County Court of Lancashire, held at Harlington, from proceeding in this cause. The defendant had issued warrants of distress for rent claimed by him as heir-at-law to one Judith Tattersall, under a document lodged in the Consistory Court of Chester which purported to be her will. It appeared, however, that a suit was pending between the defendant and the executors under that will, and that notices had been served upon the tenants not to pay rent to the defendant, and other parties had put in claims and had levied for the rent. Under these circumstances, a summons in replevin had been served on the defendant. The defendant contended that the 58th sect. of the 9 & 10 Vict., c. 95, which enacts that "the court shall not have cognisance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments" shall be in question, applied to cases of replevin. By sect. 121 it is provided, that "in case either party to any such action of replevin shall declare to the court in which such action shall be brought that the title to any corporeal or incorporeal hereditament," &c., is in question, "and shall become bound, with two sufficient sureties, to be approved by

the clerk of the court," &c., "to prosecute the suit with effect and without delay, and to prove before the court by which such suit shall be tried that such title as aforesaid is in dispute between the parties," &c., "then, and not otherwise, the action may be removed before any court competent to try the same in such manner as hath been accustomed." A rule nisi for a prohibition was granted (*Ashworth v. Sheppard*, 5 Nov. 1849).

MISCELLANEA.

Heirs dealing with their expectancies.—The restriction imposed by the rules in equity on the power of individuals to deal with their expectancies and reversionary interests is quite anomalous, and inconsistent with the rational principles on which the rules of equity are for the most part founded. A clue to the anomaly is to be found in some of the older cases, from which it would seem that some feudal notions about the preservation of ancient families entered into the minds of the judges. Thus in a case of this sort (3 Peere Williams, 293) Lord Talbot said that it was "the policy of the nation to prevent what was a growing mischief to ancient families, that of seducing an heir apparent from dependence on his ancestor, who probably would have supported him; and, by feeding his extravagancies, tempting him in his father's lifetime to sell the reversion of that estate which was settled upon him, forasmuch as this tended to the manifest ruin of families." Now it really does seem most futile, and contrary to all sound principle, to throw around an adult person, who has an expectancy or reversion, this sort of equitable protection, in order to prevent "mischief to ancient families." The power to anticipate by expectant heirs is one of the necessary incidents to settlements, which deprive the heads of families of all controlling influence over their heirs apparent; and to protect such heirs against their own extravagance, and the disadvantages under which they raise money, is, as every day's experience shows, impossible. Some limitation of this extraordinary immunity to heirs apparent seems to have been imposed by Lord Brougham's decision in the case of *King v. Hamlet* (2 Myl. and Keen, 456). In giving judgment, his lordship states it as "an incontestible proposition," applicable to the doctrines of the courts of equity, "that the extraordinary protection given in the general case must be withdrawn, if it shall appear that the transaction was known to the father, or other person standing in *loco parentis*—the person, for example, from whom the succession was entertained, or after whom

the reversionary interest was to 'become vested in possession—even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him ;" and again, " still more fatal to his (the heir's) claim of relief will it be, if the father, or person in *loco parentis*, shall be found to have concurred in this adoption of the repudiated conduct. . . . The whole doctrine, with respect to an expectant heir, assumes, that one party is defenceless, and exposed unprotected to the demands of the other, under the pressure of necessity. It would be monstrous to treat the contracts of a person of mature age as the acts of an infant, when his parent was aware of his proceedings and did nothing to prevent them. The parent might thus lie by and suffer his son to obtain the assistance which he ought himself to have rendered, and then only stand forward to aid him in rescinding engagements which he had allowed him to make and profit by." There is much good sense in the above remarks, but it is impossible to avoid seeing that they strike at the root of the rule itself; and that is the view taken of it by Sir Edward Sugden. The decision of Lord Brougham was, however, affirmed in the House of Lords, Lord Chancellor Lyndhurst, in moving the affirmation, merely saying, " that he saw no reason to dissent from the judgment in the court below." Sir Edward Sugden, in his work on Vendors and Purchasers (p. 316, 11th edit.) questions the soundness of Lord Brougham's proposition, and says that it is supported by no previous authority, and adds, " the knowledge of the parent may, under some circumstances, remove some of the objections to such a transaction, but the others might still remain. The son is entitled to be relieved, although his father may witness his ruin with indifference. *It is the son's equity*, although partly grounded on public policy. In many cases the person standing in *loco parentis*, or from whom the *spes successionis* is entertained, or after whom the reversionary property is to become vested in possession, may be more than indifferent about the worldly prospects of the expectant heir. Even in the case of father and son, how frequently we find the expectant spendthrift only following his parent's example." It is not to be denied that Sir Edward Sugden succeeds in showing that Lord Brougham's proposition can scarcely be maintained consistently with the maintenance of the rule; but does not his argument tend strongly to show the impolicy, nay the absurdity, of the rule? Apart from the sentimentalism or feudalism of " preventing mischief to ancient families," what pretence is there for preventing adults from dealing with their expectancies? All the grounds on which the equity of the expectant heir or reversioner is attempted to be raised, belong to the province of morals, not of law (11 Law Mag., N. S., pp. 285, 286).

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ABRIDGMENT OF CASES

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TABLE OF ABBREVIATIONS OF REPORTS.

BEAV. Beavan's Reports in the Rolls Court.
 COLL. Collyer's Chancery Reports (V.C. Knight Bruce's Court).
 DE GEX and SM. De Gex and Smale's Reports.
 H. L. CAS. House of Lords Cases.
 IR. EQ. R. Irish Equity Reports.
 JON. and LAT. Jones and Latouche's Irish Reports.
 JUR. The Jurist.
 LAW J., or L. J. The Law Journal; N.S., New Series; Ch. Chanc.
 SIM. Simon's Reports in V.C. of England's Court.

NOTE.—The cases at the end of the placitum when enclosed between () are cases cited in the judgments; those cases which are in *italics* are the cases reported. The cases which follow "See" are either those quoted by counsel, or are such as we have added as being in point.

ABSCONDING DEFENDANT.

Appearance where defendant has absconded to avoid service of subpoena.—On an application by the plaintiff, supported by affidavits showing that the defendant had notice of the plaintiff's intention to file a bill, and went abroad after such notice, though before the bill was filed, and stating that the deponent believed that the defendant had absconded to avoid process: Held, that there was sufficient evidence of absconding to avoid being served with process in the plaintiff's suit to bring the case within the terms of the 31st Order of 8th May, 1845. *Semble*, it is not necessary that it should appear that the defendant has absconded to avoid process in the particular suit in which the application by the plaintiff is made. *Cope v. Russell*, 12 Jur. 105.

The Lord Chancellor stated it to be his opinion that the "absconding to avoid being served with process," mentioned in the

above order, referred to the process of the court generally, and not to process in the plaintiff's suit in particular.

AMENDMENT.

1. *Time for obtaining order to amend—Master—Order of course—Affidavit.*—The orders of 1845 do not limit the time within which an application for an order to amend is to be made to the master. After the expiration of the time for obtaining an order of course to amend, the plaintiff being unable to make the affidavit required by the 68th Order, applied to the court in the first instance simply for leave to amend, and obtained the order on affidavit of service. Held, that the order was irregular, and it was discharged. *Semble*, that the application ought to have been made to the court under the 21st Order, to enlarge the time for obtaining the order to amend, without the special affidavit. *Potts v. Whitmore*, 10 Beav. 177.

Per the Master of the Rolls: "In certain cases the court has made orders for leave to amend, though not applied for in the manner directed by the statute (3 & 4 Will. 4, c. 94, ss. 13 and 14). This has been done on the notion that thereby the general object of the statute was better promoted than could have been done by a rigid adherence to its letter (see *Strickland v. Strickland*, 4 Beav. 146). The present is not one of those cases. * * * * * The order 21 reserves to the court the power of enlarging times; and upon an application made for the purpose, in proper cases, the power will be exercised on proper terms."

2. *Second order of course to amend—New parties.*—After answer a plaintiff obtained an order of course to amend. He then made A. a party; but, finding that A. was dead, he, before answer to the amendment, obtained a second order of course to amend, and substituted A.'s representatives, with apt words to charge them. The second order was discharged for irregularity, with costs. *Horsley v. Fawcett*, 10 Beav. 191.

3. *Order of course to amend—Master's jurisdiction—Without prejudice to injunction—Master of the Rolls and Vice-Chancellor.*—A party obtained from the court, after answer, the common order to amend. Afterwards, and within four weeks after the last answer was sufficient, he obtained an order of course to amend: Held, that such order was irregular. The masters have no jurisdiction to give liberty to amend, without prejudice to an injunction (60th Order May, 1845. See *Wright v. King*, 9 Beav. 161). The Master of the Rolls has no jurisdiction in a vice-chancellor's cause to order amendments, made under an irregular Roll's order, to be taken off file. *Edge v. Duke*, 10 Beav. 184.

ANSWER.

1. *Amending title of answer—Consent of clerk to solicitor—Taking*

answer off file.—A plaintiff instructed his solicitor to give no further indulgence to the defendants. The solicitor's clerk, who was ignorant of that circumstance, and who was sworn to be ignorant of the practice of the court, consented in writing, in the name of his master, to alterations made in the title of the answer after it was deposited with the clerk of records and writs. On the application of the plaintiff, the court ordered the answer to be taken off the file, with liberty for the defendants to re-swear it within three weeks. *Raistrick v. Elsworth*, 12 Jur. 782.

2. *Order for further time to answer—Terms—Filing plea.*—Under a master's order, allowing further time to answer, the defendant may file a plea. If it is intended to limit the defendant to putting in an answer only, the order must so specify it. *Hunter v. Nockolds*, 12 Jur. 149.

The Lord Chancellor said that there could be no doubt that where an order was obtained for further time to answer, without any limitation specified, the party obtaining the order would, according to the practice of the court, be at liberty to plead, answer, or demur, as he might be advised; that the present practice was the same as that which had always existed, the only variation being that applications formerly made to the court were now made to the master; that if, under an order giving further time to answer, it was intended to limit the nature of the defence, this limitation must be specified.

3. *Reference to Master—Vacation Master—Referring exceptions—Irregularity—Certificate of Record clerk.*—During the long vacation the defendant, for the purpose of obtaining a reference to the master, procured the record and writ clerk's certificate, which was marked at the public office with the name of the master in rotation. He neglected, however, to return it to the record and writ clerk to be filed. In the next term the plaintiff obtained a reference of exceptions, as to insufficiency, to another master, as if there had been no previous reference, and who certified the answer insufficient: Held, that the latter proceeding was irregular, and that the defendant was not bound by the certificate; but as the defendant himself had been irregular, the court would not discharge the certificate simply, so as to dissolve the injunction and make the answer sufficient, but did so without prejudice to the injunction, and referred the exceptions to the proper master, on the usual terms. As to common matters which occur in the vacation the vacation master acts, and is considered as acting for the several masters in rotation, to whose offices such matters respectively may belong; and, therefore, in the vacation, the production to the vacation master of the certificate is a sufficient compliance with the 17th Order of December, 1833, which requires its production to the master in rotation. The court has sufficient autho-

rity, when the occasion requires its exercise, to prevent parties converting its own rules, and the sanctions employed to enforce them, into the means of injustice. *Lord Suffield v. Bond*, 10 Beav. 146.

Per Master of the Rolls: "When the name of the master in rotation is to be obtained for the purpose of a first order of reference, it is done at the public office, without any name being marked, on a certificate of the record and writ clerk; and it is the course at the public office to make entry there of the name of the master in rotation to whom any cause is referred, whether the name is obtained for the purpose of a first application, in which case it is marked on a certificate of a record and writ clerk, or for the purpose of a first order of reference, in which case it is not so marked. I think, therefore, that the defendant was right in saying that if the plaintiff's solicitor had inquired at the public office, he might have found there that Mr. Farrer had already been certified to be the master in rotation to whom the cause was referred. But if he had inquired at the place where, by the 17th Order of December, 1833, it was intended that he should obtain the information, he would not have obtained it, because the defendant had not returned the certificate marked with the name of the Master in rotation, as the order directed him to do. * * * The defendant was on his part irregular in not returning the certificate of the record and writ clerk, with the name of the master in rotation marked on it."

APPEAL.

Staying proceedings pending appeal.—A demurrer had been allowed with costs; but an appeal had been heard and was standing for judgment. A motion to stay proceedings for the costs was refused with costs. *Bainbrigge v. Baddeley*, 10 Beav. 35.

BANKRUPTCY.

1. *Removal of fiat—Property in two districts*.—A fiat in bankruptcy against partners carrying on business in one bankruptcy district was issued in another district in which one of the partners was residing. The court, on petition, removed the fiat to the former district, although it was alleged that the separate property of the one partner, to which recourse would be necessarily had, was wholly situate in the district in which the fiat was issued. *Re Grylls, Stubbs, and Cousens*, 12 Jur. 171.

2. *Annulling fiat—Misdescription of residence*.—A trader of Sligo, who never resided or traded in London, was made bankrupt as of "Sligo," in Ireland, and "33, Gresham-street, London." The court refused to annul on the ground of misdescription. Whether the 6th sect. of the stat. 1 & 2 Vict. c. 110, is repealed partially by the stat. 5 & 6 Vict. c. 122, *quære*? *Exp. Delany, re Delany*, 12 Jur. 776.

Per Knight Bruce: "The question of legal validity is in such a

state that it is equally impossible to dismiss the petition and annul the fiat. With regard to the affidavit, I should, but for the analogy to be derived from former authorities, have decreed probably in favour of the petitioner at once. As the authorities stand, however, the question must go to a court of law, unless the petitioner will now give the security for the debt required by 1 & 2 Vict. c. 110, s. 8, and the respondents shall consent that the fiat shall be annulled on those terms. Is the petitioner now prepared to give that security for the debt, if the debt be due?"

3. *Restraining the issuing of a fiat—No debt due.*—The court has no jurisdiction to restrain the issuing of a fiat under 1 & 2 Vict. c. 110, upon the ground that there was no debt due to the alleged creditor. *Pim v. Wilson*, 12 Jur. 781.

Per Lord Chancellor: "There is, in fact, no new law, but arrest being abolished, a party is put in the same position by the process substituted, through a non-compliance with the act in not procuring security to abide the result of an action. It is not a hardship on the debtor; it is a remedy not altering the rights of the creditor, but relieving the debtor from lying in prison for twenty-one days. He may now pursue his own occupations, walk about the world, and be a free man, instead of being subjected to imprisonment as formerly. The hardship of the old law was, that by lying in prison the debtor was incapacitated from obtaining relief. Did any one ever hear of a bill under the old law praying an injunction to restrain proceeding under an arrest, on the ground of there being no debt, and solely on that ground? If no such step could be taken under the old law can it be taken under the new? The remedy provided is a legal remedy. Under the old law it was by arrest, and under the new it is by a proceeding substituted for arrest. In *Attwood v. Banks* (2 Beav. 192), the Master of the Rolls did not interfere with this subject, because it was not before him; the claim there was of quite a different character; there was a clear equity stated, and the Master of the Rolls entertained no doubt as to the jurisdiction of the court. The Master of the Rolls came to a sound conclusion that the court had the same authority, by way of injunction, to restrain proceeding under the 1 & 2 Vict. c. 110, as it has to restrain an action, or as it has in any other case. To restrain the issuing of the fiat is, however, a very different proceeding; it is not one with regard to a single creditor only, but affects all the creditors generally. This court has never been applied to do this, on the ground that there was no legal debt; and the bill here suggests no other ground—there is no other equity stated."

4. *Assignment before fiat for the benefit of creditors*—Proceeds to be administered under the fiat. — A trader assigned his property to

trustees for the benefit of his creditors: he then filed a declaration of insolvency, but did not apply for adjudication. At the date of the deed he was indebted to A. and B., and they applied to the commissioner for adjudication, and fulfilled the requirements of the statute, and the adjudication was made. The trustees of the deed had sold the property, and the assignees applied to them to allow the proceeds to be administered under the bankruptcy, which they refused: Held, that under the circumstances, the money belonged to the fiat, and ought to be administered in the bankruptcy. *Esp. Jackson, re Ferens*, 12 Jur. 770.

Per Knight Bruce, V. C.: "I understand that the debt of the trustees for the benefit of the creditors was due to them at date of the deed. If the fiat had issued on their own petition the deed must have failed. Then I find that the act says, that all further proceedings shall be thenceforth prosecuted and carried on in like manner as if such fiat had been issued and adjudicated upon the petition of a creditor of the bankrupt. I think that under this state of circumstances, the money belongs to the fiat, and ought to be administered in the bankruptcy."

BILL.

1. *Serving copy — Bill of revivor, &c.* — By 23 and 24 Orders of 26 Aug. 1841, where no account, payment, conveyance, or other direct relief is prayed, and the defendant is not an infant, the plaintiff may serve the defendant with a copy of the bill (whether original, amended, or supplemental) without praying a subpoena to appear and answer. It has been held that a bill of revivor and supplement is within the above order. *Walcot v. Walcot*, and *Walcot v. Fosbery*, 10 Beav. 20.

2. *Serving copy after regular time — Memorandum of service.* — By the 16th order of May, 1845, the copy bill must be served within twelve weeks from the filing of the bill, otherwise it will be of no validity, unless the court give leave for service after the expiration of the twelve weeks. In a case where a copy bill was served without leave after the expiration of twelve weeks, the court on the joint application of the plaintiff and the defendant, gave liberty to enter a memorandum of service. *Tugwell v. Hooper*, 10 Beav. 19.

DECREE.

Vacating enrolment. — An application by a party to vacate his own enrolment of a decree is to the discretion of the court, and not of right. The practice in vacating enrolments is the same in Ireland as in England. *Battersby v. Rockfort*, 9 Irish Eq. Rep. 499.

Per Lord Chancellor: "The consequence is, as I do not consider it to be a matter of right in a party to vacate his own enrolment, and the case not being one in which the discretion of the

court would be exercised in favour of the applicant, I cannot grant this application. I should add that I do not acquiesce in the opinion cited from the case before Lord Plunket (*Jackson v. Welsh*, 1 Dru. and Warr. 255, 258). The additional expense of an appeal from this court may be an element in considering the question where the court has to exercise a discretion; but it cannot introduce different rules here and in England. The practice of the courts in both countries is the same, and must be so."

DEMURRER.

Misjoinder of parties.—A defendant cannot demur on the ground that a party has been improperly made a co-defendant. *Roberts v. Roberts*, 12 Jur. 148.

DISMISSAL OF BILL.

Replication after notice to dismiss—*Neglect to give notice of replication*—*Costs of motion to dismiss*.—The plaintiff after service of notice of motion to dismiss for want of prosecution, and on the same day, filed replication, but did not give notice thereof till the following day. He afterwards tendered the costs of the notice of motion which the defendant refused to accept, on the ground that the replication was irregular, as notice thereof had not been served in conformity with order 23rd, October, 1842, on the same day that replication was filed. The defendant then moved to take the replication off the file as irregular, and, upon the motion being refused, the plaintiff applied to the court for his full costs of the motion to dismiss. The court ordered the defendant to pay the plaintiff his costs of the motion, minus 20s. *Wright v. Angle*, 12 Jur. 34.

1. *Disclaiming defendant.*—Motion by plaintiff that the bill might be dismissed against a disclaiming defendant, with costs, but without prejudice to any question how the costs of that defendant should be ultimately borne, refused. The other defendants were not served. *Wigginton v. Pateman*, 12 Jur. 89.

See *contra*, *Bailey v. Lambert*, 5 Hare, 178; S. C. 10 Jur. 109, where Vice-Chancellor Wigram made an order similar to that asked for in the above case.

2. *Irregularity—Demurrer—Suppression of facts.*—A demurrer having been overruled with costs, the defendant appealed. The plaintiff afterwards obtained an order of course to dismiss his bill, suppressing the fact of the allowance of the demurrer; it was discharged for irregularity. *Lewis v. Cooper*, 10 Beav. 22.

3. *Several answers by same solicitor—Answer after notice to dismiss.*—Motion to dismiss for want of prosecution refused, with costs, it appearing that the solicitor for the party moving had filed an answer for another of the defendants within the period allowed for

obtaining an order to amend the bill. The bill had been amended a second time on the 4th May, 1848. On the 10th of June, M., one of the defendants, filed his answer, and on the 30th of October, served notice of motion for the 13th of November to dismiss. The same solicitor put in another answer for another defendant on the 5th of August, 1848. *Winthrop v. Murray and others*, 18 Jur. 82.

EVIDENCE.

1. *Expenses of commissioner—Examiner.*—Where a commission to examine witnesses issues at the instance of one of the parties to the suit, the other not concurring in it, the party issuing it must pay all the expenses of the commissioner, even though the other party should cross-examine the witnesses of the person issuing the commission; but if the opposite party examines under the commission on the direct, he must pay the commissioner for the examination and cross-examination of his own witnesses. *Lucas v. O'Malley*, 2 Jones and L. 681.

Nors.—The above decision was come to in accordance with a certificate to that effect from the Masters.

2. *Publication—Issue to Ecclesiastical Court—Publishing depositions of deceased witness.*—Where a bill was filed in the Court of Chancery impeaching a will, and a suit to recall the probate had been instituted in the Prerogative Court, and a witness, who was examined *de bene esse* in the Chancery suit, died after having been examined, the court will not permit his depositions to be published for the purpose of using them in the Ecclesiastical Court, issue not having been joined in the suit of Chancery, and publication therefore not having passed in such suit. *Showell v. Hilliard*, 9 Ir. Eq. R. 469.

Per Master of the Rolls: "The application is wholly untenable. Suppose the witness in this case, after having been examined in the ordinary way, had died before publication passed, it is quite plain that there could not have been any publication of his evidence before the other witnesses had been examined and publication had passed in the cause. Such a proceeding would be contrary to all principle. The proper stage of the suit wherein an application of the kind should be made is after publication has passed in the cause, unless in such case as is mentioned in *Daniell's Practice*, p. 918 (see *Gason v. Wordsworth*, 2 Vea., sen. 336). As to the other suit being in the Prerogative Court, that does not make any difference."

3. *Suppressing depositions—Delay.*—Where nothing had been done in a cause for many years till November, 1847, the court, after having refused the defendant leave to file a new replication, and having refused to dismiss the cause, but having ordered it to be set

down, refused to suppress depositions taken in December, 1847-*Lewis v. Thomas*, 12 Jur. 67.

The Vice-Chancellor said: "I cannot see anything that amounted to passing of publication. I am not at liberty at present to suppress these depositions, because the witnesses were examined after publication had passed. I desire to say that I mean to adhere to the rule of *Wheatley v. Wheatley* (7 Beav. 577), and *Lovell v. Blew* (13 Sim. 492; 9 Jur. 1002), in all cases wherever an application comes on that question; but nothing has yet happened which has affected the ground of the present application."

4. *Notice of witnesses—Suppressing depositions—Delay.*—In 1 *Daniell's Pract.* 889 (2nd edit.), it is said: "Previously to the examination of each witness, the solicitor of the party for whom he is to be examined prepares a note containing the name, rank or occupation, age, and place of abode of the witness, and of the several interrogatories to which he is to be examined. This notice is to be delivered to the commissioner; at the same time as the witness is sent in to him, a similar note is usually sent to the solicitors for the other parties, that they may have the witness cross-examined if they think proper." In a late case, motion to suppress depositions, on the ground that notice of the names of the witnesses had not been given to plaintiff, but plaintiff's solicitor was aware of their being examined, and the notice of motion was not given for twenty days after publication had passed, refused. *Quære*, whether it is necessary for a defendant to give the plaintiff notice of the names of his witnesses. *Smith v. Pincombe*, 13 Jur. 91.

Per V. C. of England: "It appears to me, without entering into the question, that the circumstances of the case forbid me from granting this motion, because, as I understand it, the country solicitor, who seems really the solicitor for the plaintiff, inasmuch as the London solicitor acts merely under his instructions, actually attended at the time of the examination, and not only saw the witnesses but conversed with them; and it appears, the examination having terminated on the 9th of August, that publication passed on the 4th Nov.; but it is not until the 24th that any notice is given, but then notice was given for the 2nd Dec. My opinion is, after such a long delay, it would be quite wrong for the court to interfere here. Publication has passed, and the parties have had opportunities of ascertaining the weight of the evidence, and it is not till twenty days afterwards that they attempt to rectify the error."

INFANT.

1. *Guardian—Appointing to answer.*—After an infant defendant had appeared the plaintiff moved, under 32nd Order of May, 1845,

EQUITY]

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that J. S., a solicitor, might be appointed the infant's guardian to answer the bill and defend the suit. Held that, as the infant had appeared, the court might grant the motion on an affidavit, stating merely that notice of the motion had been served on the solicitor who had entered the appearance, after the expiration of the time allowed for answering, and more than six days before the hearing of the motion. *Cookson v. Lee*, 15 Sim. 302.

2. *Day to show cause—Mortgage—Foreclosure.*—In a decree for a sale in a mortgage cause, an infant owner of the equity of redemption is not entitled to a day to show cause. *Hutton v. Mayne*, 9 Irish Eq. Rep. 343.

Per Lord Chancellor: "In this case, which is a foreclosure suit, the equity of redemption is vested in an infant tenant in tail deriving under the mortgagor. There must be a decree for a foreclosure and sale; and the question is whether a day to show cause should be given to the infant. I have looked through the authorities again for the question, and it appears to me that it should not. He has only an equity. The decree is for a sale, and I think the infant is not entitled to a day to show cause; the sale is, in fact, for his benefit."

NOTE.—The cases cited were (against a day being given) 2 Haye's Convey. 184; *Clinton v. Bernard*, 6 Ir. Eq. Rep. 355; *Payton v. M'Dermott*, 6 *Id.* 220; for a day being given, *Price v. Carver*, 3 M. and Cr. 157; *Scofield v. Heafield*, 7 Sim. 669, and 8 *Id.* 470; *Flood v. Sutton*, 3 Ir. Eq. Rep. 340; *Cooke v. Parsons*, 2 Vernon, 429.

INJUNCTION.

1. *Breach of covenant—Purchaser with notice of equity, bound by it.*—A. purchased a piece of pleasure-ground, in the centre of a square in London, from B., and covenanted not to use it otherwise than as a pleasure-ground. The pleasure-ground subsequently became vested, by purchase, in C., who made preparations for building upon it. The Master of the Rolls, at the instance of B., restrained C. from using the ground otherwise than as a pleasure-ground, although it was alleged that the covenant did not at law run with the land. The Lord Chancellor, on appeal, affirmed this decision. *Tulk v. Moshay*, 13 Jur. 26, 89.

Per Lord Chancellor: "The question is whether the party taking property (the vendor being bound to use it in a certain way) may use it in a way diametrically opposed to the contract. In this event what would become of all the cases before the Vice-Chancellor, and of the case before Lord Eldon, in the *Duke of Bedford v. the Trustees of the British Museum* (2 Myl. and K. 552)? On what grounds Lord Eldon proceeded in that case we

do not well know; but in the *Fofoes of Heriot's Hospital v. Gibson* (2 Dow, 301), it is clear that he held that the court would interfere with the using of property contrary to a contract. Nothing could be more equitable than that a party, taking property at a less price because fettered, should be enabled to dispose of it as if not fettered. This court would not sanction such a course of proceeding, but has always acted on the contrary principle. This has nothing to do with the question of covenants running with the land. Here there is no difficulty as to the form of the contract, as from the exhibition of a plan, for here is one on the face of the deed, and no question arises as to not going out of the deed. There is no question about legal liability. A party who takes with notice takes subject to all equities created by the owner of the property; and it must be a rule of this court to protect equitable rights thus attached. The fact of there being in this case such an equity attached is clear. It is also clear that the party does not dispute that he takes with notice. It seems to me to be the simplest case possible; for, without adverting to any questions as to covenants running with the land, I consider this property to be bound by an equity, and that the party takes it with notice of this equity."

2. *Motion by some defendants to dissolve as against all.*—An injunction having been obtained by the plaintiff to restrain a joint action against him by several defendants, all the defendants but two put in their answers, and obtained an order to dissolve the injunction as against themselves; the other two defendants then put in their answers, but refused to move to dissolve. It was held that those defendants who had obtained the order to dissolve were now at liberty to move to dissolve as against the other two defendants, without serving them with notice of the motion. *M'Gregor v. Conyngham*, 18 Law Journ., N. S., Chanc. 41.

Per V. C. Knight Bruce; "This seems to me a matter of course, and I am confirmed in my opinion by what was done by Lord Eldon in *Joseph v. Doubleday* (1 Ves. and Beam. 497), where it was held that some defendants might move to dissolve as against all. * * * If the plaintiff had shown that the two defendants who had not been served with this notice of motion had expressed a desire that the injunction should not be dissolved, that would have been a reason for the court to hold it hand."

INTEREST.

Decree for—Bond—Interest beyond penalty.—The decree having declared that a creditor by judgment upon a bond in a penalty for securing a principal sum, with interest, was entitled to the sum reported to be due to him, together with interest on the principal sum from the date of the report until paid, the parties to the suit are con-

cluded from denying the right of the creditor to interest beyond the penalty. *Wilson v. Poe*, 2 Jones and L. 765.

Per Lord Chancellor: "Parties must take care in future to insert proper words into their decrees, limiting the right to recover interest to the amount of the penalty."

See *Clarke v. Seton*, 6 Ves. 411; *Pomeroy v. Pomeroy*, 6 Ir. Eq. Rep. 475, note.

LIEN.

Solicitor—Assignment of debt.—A debt due to an attorney for costs may be assigned; and if it is assigned, the assignee may be entitled to dormant lien for the debt as an additional security. *Bull v. Faulkner*, 13 Jur. 93.

Per K. Bruce, V. C.: "If the law allows the assignment of debts, a debt due to an attorney for costs may be assigned; and, if it is assigned, the assignee may be entitled, in some measure, to the dormant lien for the debt as an additional security. For that purpose it is not very important whether the deeds are in the hands of the original creditor or of the assignee of the creditor. Now I cannot agree that the assignees have not a lien which is not a charge or incumbrance—that is, a dormant lien—merely because it was a debt due to an attorney, for which he had (if he had) a lien on the deeds."

MOTION.

1. *Appearances on—Asking for time to answer affidavits.*—The application of a party by his counsel for time to answer affidavits filed in support of a motion, whereupon time was given and affidavits filed, is not an appearance by that party on the motion, entitling the other party to obtain the order on a subsequent motion day, without an affidavit of service, no counsel then appearing for the opposing party. *Hutton v. Hepworth*, 6 Hare, 319.

2. *Party unnecessarily served—Costs.*—Parties unnecessarily served with notice of motion, and only appearing to ask for costs, will not be allowed the costs of their appearance. *Major v. Major*, 13 Jur. 1.

Per Lord Chancellor: "The costs of these parties must be paid by themselves, as there was no necessity for them to appear. They only appear to ask for costs."

See *Templeman v. Warrington*, and *Heneage v. Aikin*, 1 Jac. and Walk. 377; *Garey v. Whittingham*, 1 Turn. and Russ. 405; *Bamford v. Watts*, 2 Beav. 201. The following passage from 2 Dan. 1466, 2nd edit., is, therefore, now wrong: "Since the death of Sir T. Plumer, the practice has been altered, and every party who is served with a petition is considered entitled to his costs of appearing on it, whether he is interested in the matter or not."

ORDER.

1. *Minutes, altering.*—The minutes of an order having been once settled by the Registrar, cannot be altered in the absence of any of the parties interested. *Major v. Major*, 13 Jur. 1.

Per Lord Chancellor: "When once an alteration has been settled by the Registrar, if one party thinks he can get it altered, he can only do so by bringing all parties before the Registrar. It is not justifiable for any party to go behind the back of his opponent, and by a statement (true or false is immaterial) obtain an alteration in the order, of which the other party has no notice. * * * Being satisfied that the irregularity has been brought home to the solicitor who obtained the alteration, it is a matter quite of course that the party applying to have the order restored to its original position should be paid his costs, and that the other party should pay such costs to him, that is, they must be paid by the solicitor who has been in fault."

2. *Order must not depart from terms of notice*—*Notice of dismissing bill.*—An order made upon affidavit of the service of motion must not depart from the terms of the notice, even though it be less extensive than the notice, if such less extensive order may be more prejudicial to the party against whom it is made, than would have been the larger order which was asked. The notice was, that the court would be moved to dismiss an original and a supplemental cause, or to direct the original cause to be put into the paper for hearing; the order made upon affidavit of service was, that the supplemental cause should be dismissed, and the original cause put in the paper: the court, upon motion, discharged the order. *Hutton v. Hepworth*, 6 Hare, 315.

V. C. Wigram said that the rule was well-known, that an order taken upon an affidavit of service of the notice of motion ought not to depart from the terms of the notice. The rule certainly might not universally prevent a party from taking an order for less than his notice expressed, where the lesser order could be made without prejudice to the party against whom it was to operate. * * If the order had gone no farther than to direct that the original cause should be put into the paper for hearing, it would have been right. * * The order ought to be discharged, except so far as it directed the original cause to be set down for hearing.

PARTIES TO SUITS.

Next of kin—*Demurrer for mis-joinder.*—A testator directed his real estate to be sold, and gave the produce of it and all his personal estate to his three daughters, and, in case they should die under twenty-one and unmarried, in trust for the persons or person who, under the statutes for the distribution of the estates of intestates,

would then be entitled thereto. In a suit to administer the estate, in which the testator's widow was joined with the three daughters as plaintiff: held, that, whether she were or not a necessary party, she was not such an improper party as to enable the defendants to demur on that ground to the bill. *Roberts v. Roberts*, 12 Jur. 89.

PAUPER.

Appealing in forma pauperis.—The Lord Chancellor made an order, on production of the usual affidavit (upon which counsel's certificate that the appeal was proper was indorsed) that the plaintiff's petition of appeal might be received without the usual deposit, and that he might prosecute the same *in forma pauperis*. *Clarke v. Wyburn*, 12 Jur. 166.

PRODUCTION OF DOCUMENTS.

Privileged, affidavit of—Contradicting.—Upon a motion for production of documents, the defendant was permitted to produce an affidavit to show they were privileged: held, that the plaintiff was not entitled to use an affidavit in opposition to it. *Blenkinsopp v. Blenkinsopp*, 10 Beav. 143.

The Master of the Rolls said: "I rather think that on such a motion as this, the court receives no evidence in contradiction to the statement of the defendant; and my impression also is, that you give the same credit to the defendant's affidavit as to his answer." Subsequently, after referring to a case in which it had been decided that the answer of one defendant could not be used as an affidavit against another defendant (*Hoare v. Johnstone*, 2 Keen, 553; and see *Mayer v. Montrieux*, 9 Beav. 521), his lordship held that the affidavit produced in support of the motion was inadmissible.

PURCHASE MONEY.

Paying into court—without interest.—An estate was sold under a decree of the court in October, 1846, under conditions, one of which was that the purchase money should be paid on or before 1st January following, and if, from any cause whatever, the money should not be paid, the purchaser making default should pay interest from that day until the time of payment. The abstract delivered showed a defective title. The purchaser gave notice to the vendor that the money was lying idle, and in January moved for liberty to pay the money into court, without accepting the title; but that motion was refused, as being contrary to the practice of the court. In September, 1847, the defect in the title was cured. A motion by the purchaser to pay his purchase money into court, without interest, was, under the circumstances, granted *Denning v. Henderson*, 12 Jur. 89.

Per Knight Bruce, V. C.: "I understand, through the registers of the court, that it is a general rule of the court, though

capable of relaxation in particular circumstances, that when the title is not accepted, the money cannot be paid. It is, generally speaking, an impossibility. This is an impossibility arising from the default of the vendor, not from that of the purchaser. The condition goes on to say, 'if from any cause whatever the purchase money shall not be paid on or before the 10th of January, the purchaser making default shall pay interest from that day on the amount, until the time of payment.' It does not seem to me that the purchaser has made default."

RECEIVER.

1. *Waiving security.*—The court will not appoint a receiver without the usual security. But where parties were all *sui juris*, and the absolute owners of the property, leave was given for a receiver appointed by them to act without the usual security. *Manners v. Furse*, 12 Jur. 129.

The Master of the Rolls said he had caused the Registrar's book to be examined as to the case of *Ridout v. Plymouth*, and it appeared that the same course had been adopted in that case which he himself had suggested in this, viz., that the parties themselves should appoint a receiver without giving the usual security, and then apply to the court for liberty for him to act. He should, therefore, follow that authority and grant the application, that the receiver appointed by the parties should be at liberty to act without giving the usual security.

2. *Where several receivers appointed of same property in different causes—Course to be pursued.*—On the 14th June, Shepherd, the receiver of the landlord's interest in a farm, appointed in the cause of *W. v. S.*, distrained the growing crops on the farm for a year's rent and expenses. On the 19th June *R. B.* was appointed, in the suit of *G. v. G.*, receiver of the tenant's interest in the farm. Upon *G. B.* tendering the rent only, but not the expenses, to Shepherd, both receivers claimed the crops, and both attempted to reap them. *R. B.*, having the stronger party, succeeded; and on the 11th of August stacked the crops on ground apart from the farm. Shortly afterwards another half-year's rent became due, which, with the year's rent previously due, was tendered by *G. B.* to Shepherd, and by him accepted. The expenses incurred by Shepherd about the distress having been left unpaid, the plaintiff in the suit of *W. v. S.* served notice of motion for November 10, to commit *R. B.* for contempt in having improperly interfered with Shepherd in the collection of the rents. Held, under the circumstances, that motion to commit was not the proper course of proceeding, and the motion was directed to stand over, with liberty to the plaintiff in *W. v. S.* to make such application as he might be advised in the suit of *G. v. G.* Where a receiver duly appointed in a cause on proceeding to take possession of

property, the subject of the suit, finds another receiver appointed in a different cause in respect of a different interest already in possession, or claiming to be entitled to the possession, of the property, the proper course is to apply to the court for directions how to act. *Ward v. Swift*, 12 Jar. 173.

SCIRE FACIAS.

Repealing patent—Alien—Monopoly—Security for costs.—A writ of scire facias to repeal letters patent having been issued by the authority of the Attorney-General at the instance of an alien, it was held, on application to the court to stay proceedings thereon (after a similar application to the Attorney-General had failed), on the ground that the prosecutor of the writ was an alien, and that the security for costs was insufficient, and on other special grounds, that the court had no jurisdiction to interfere, but that the control of the proceedings rested entirely with the Attorney-General. *Semble*, an alien may prosecute a writ of scire facias to recall letters patent. *Reg. v. Prosser*, 18 Law Journ., N. S., Chanc. 35; S. C. 13 Jur. 71.

Per Master of the Rolls: "After giving the case of *Reg. v. Nielson* (Webster's Pat. Cas. 672) my best attention, it does not appear to me to be any authority for the interference of this court on the present occasion. Being of opinion that I have no jurisdiction in the case, it is unnecessary, and perhaps not proper, for me to express any opinion upon the reasons on which the application is grounded: but, having paid necessarily some attention to the subject, I hope I may be excused for saying that I see no reason to doubt the propriety of the decision that was arrived at by the Attorney-General on the two principal points of objection. I need not now consider at all the duty which the Crown has to protect legal patentees against improper litigation. There can be no doubt but that it is the duty of the Crown to protect the public from illegal monopoly. An illegal monopoly is a public grievance; and the able argument addressed to me in support of this application has failed to persuade me that the Crown, having been informed of such a grievance, and having the power and duty to remove it, if it be such, ought to be disabled from directing the necessary proceedings to ascertain the truth, because the information was given by an alien, or by a person who had no special or direct interest in the matter, or was endeavouring to promote the interest of some other person, or was actuated by some improper motive. And, with respect to the alleged insufficiency or impropriety of the security, I think the practice of taking security is highly beneficial and important, but it is not founded on any law or rule of court, but seems to have been very properly introduced by the authority of the Attorney-General alone almost within living memory. There is no instance whatever of the court having in-

terfered on the subject; and I cannot doubt but that, if it be shown to the Attorney General that the security has been, or is insufficient, he will stay the proceedings till it is made good. Upon the whole, I am of opinion that this application must be refused."

SOLICITOR.

1. *Articled clerk—Neglect to file affidavit of execution.*—An articled clerk had neglected to file a necessary affidavit within six months; but the omission "had arisen from inadvertence only." It was held that this was not a sufficient ground for relieving him from the consequences, under the 6 & 7 Vict. c. 73, s. 6. *Re Benson*, 10 Beav. 435.

Per M. R.: "My opinion is, that the inadvertence of the solicitor is not a sufficient reason for relieving from the consequences of a non-compliance with the directions of the act of Parliament."

2. *Death of principal—Acting afterwards—Liable to costs.*—Where a town agent, employed to prove a debt under a decree after the death of his principal, took proceedings unauthorised by the principal, and not relating to the proof of debt, by which costs were incurred by parties in the suit, he was ordered to pay such costs on the petition of the parties by whom they were incurred. *Malins v. Greenway*, 12 Jur. 66.

3. *Taxing bill—Delivery of Deeds—Jurisdiction of Vice-Chancellors and Master of the Rolls.*—An order having been made at the Rolls for the delivery of a solicitor's bill of costs, application for the delivery of deeds, &c., after payment of the bill of costs, should be also made at the Rolls. *Re Mills*, 12 Jur. 129.

Per Knight Bruce, V. C.: "My impression is, that this application should be made at the Rolls. Mr. Berry, the clerk of records and writs, will be good enough to see what is the view of his lordship the Master of the Rolls on the point." Mr. Berry, at a subsequent period, informed the court that the Master of the Rolls concurred in his honor's view, and the motion was accordingly refused.

STAYING PROCEEDINGS.

Two suits—Decree not obtained in one.—Motion in a suit, in which no decree has been obtained, to stay further proceedings in a suit in which a decree has been obtained, refused, there being no misconduct or other special circumstances to induce the court to interfere. *M'Hardy and Wife v. Hitchcock*, 12 Jur. 781.

The Lord Chancellor remarked, that cases of this kind were matters of discretion, but that here it was clear, that the order now complained of could be beneficial to no party; that although delay had certainly occurred, yet there was nothing to impeach the conduct of the plaintiff in the original suit; that the sole question

was, who were the next of kin of the deceased, and that, as no one but Mr. Hardy has ever claimed as such, the effect of taking any other course than that the plaintiff had taken would have been prejudicial to all parties by bringing in the claim of the Crown. His lordship, after stating that he felt great objection to stay proceedings under a decree, at the instance of a party who had no other decree to put in the place of the one already obtained, said: "I am here asked to order that the decrees obtained shall not be prosecuted, and there is no security that the plaintiffs who ask me to do this will ever bring their suit to a hearing; indeed, if they do so, they can only obtain a similar decree. I shall thus be shutting out from the use of the decree all parties interested under it for a party, as to whom I cannot tell that he will ever bring his suit to a hearing, or if he does obtain a decree, that he will obtain any other decree than that now existing."

SUBPOENA.

1. *Substituted service*.—Solicitors had acted for a defendant in several transactions concerning and in a suit relating to the subject matter of this suit; the Court refused to give leave to make substituted service of the subpoena on them. *Hurst v. Hurst*, 12 Jur. 158.

Per Knight Bruce, V. C.: "The application made before me is not one against an absconding defendant under any of the new orders, but to make substituted service under the general practice of the Court. I am of opinion that the affidavits do not state a case in which, according to the law and practice of the court, such an order may be made."

2. *Substituted service where defendant out of country*—*Solicitor dying*—*Appointing new solicitor*.—The solicitor of a defendant against whom costs had been decreed, and who had gone out of the jurisdiction, died pending taxation. The Lord Chancellor, on the application of the plaintiff, gave leave to serve notice to appoint a new solicitor at the last place of residence in England of the defendant, and ordered that such service should be good service on the defendant. *Gibson v. Ingol*, 12 Jur. 106.

TRAVERSING NOTE.

Service of copy of note on defendant who has not appeared.—Personal service of the copy of a traversing note may be made (by leave of the Court, independently of the original orders) upon a defendant who has not taken any step to defend the suit, either in person, or by a solicitor, and where the service cannot therefore be made in the manner directed by the 56th General Orders of May, 1845. *Laurie v. Burn*, 6 Hare, 308.

ADMINISTRATION SUIT.

1. *Injunction to stay action—Action in foreign country—Costs where threat of proceeding with action.*—A creditor of a testator brought his action in Scotland, being ignorant of the existence of a decree for administration in this court. Upon the hearing of the decree, he brought in his claim before the Master; but, in consequence of an objection, which could not prevail in Scotland, being made to his claim, he threatened to go on with his action. Plaintiff then applied for and obtained an injunction, and the creditor was ordered to pay the costs of the motion. The Lord Chancellor refused to allow the action to proceed to a verdict, and was of opinion that the creditor was rightly ordered to pay the costs of the motion for the injunction. *Graham v. Maxwell*, 13 Jur. 217.

Per the Lord Chancellor: The decree in this suit is in the nature of a judgment for the creditors; they are all to go in before the Master and establish their debts. If any difficulty arises, the court often directs an action, but not until, upon an investigation before the Master, it appears that there is such a difficulty in the way. There does not seem to be any specialty in the present case; and I cannot lay down such a rule as that, wherever a right of action arose out of the jurisdiction of this court, actions should be allowed to go on, notwithstanding the decree in an administration suit. As to the question of costs, I do not see my way so clearly. The costs were properly ordered to be paid by the creditor. Contrary to the known practice of the courts, he threatened to go on with the action. The question is, whose conduct rendered the expense of the motion necessary. The creditor comes in under the decree, whereby he is made *quasi* party to the cause, and he afterwards rendered the application necessary; of course he must pay the costs.

2. *Action restrained—Notice of decree—No accounts—Costs.*—The answer of the executrix in a legatee's suit contained no accounts, and the decree did not direct an account of real estate. A creditor proceeding at law, after notice of the decree, restrained, on motion, without being allowed his costs of application. *Bush v. Windey*, 13 Jur. 273.

Per Vice Chancellor: "I am of a different opinion; because, in the first place, I never heard that it was necessary, in order to justify an application made by the estate against the creditor, that the answer should set forth a schedule. It is quite sufficient that an affidavit should be made at the time of the application; and it is quite reasonable that the statement of assets should be made as late as possible, in order that it may be more complete. Here the application is made, with a statement of what the estates were; and the plaintiff went on, though he had notice of what had occurred."

AMENDMENT.

Time for amending—Amendment on allowing demurrer.—By 16th Order of May, 1845, the plaintiff having obtained an order for leave to amend his bill, has fourteen days after the date of the order for so doing, in all cases except where the order is made without prejudice to an injunction (Pract. Equity, 226, 227). It has lately been decided that the above 34th article, limiting the time within which a bill must be amended, applies not merely to orders of course to amend, but to all orders giving leave to amend, including orders allowing demurrers. *Armistead v. Durham*, 13 Jur. 330.

Lord Langdale, M. R., said: There was no reason for supposing that the above general order did not apply to an order giving leave to amend. His strong impression was, that the bill was irregularly amended, in contravention of this general order, the amendment not having been made until five months from the time of leave to amend being granted. But, as this had been done in accordance with an opinion that the plaintiff had a right so to amend his bill, he should be very slow to put him to the necessity of filing a new bill by ordering the amended bill to be taken off the file. He thought he ought to make no order on the present application, but the plaintiff must pay the costs of it.

BANKRUPTCY.

1. *Suspension of certificate—Arresting—Discharge under 11 & 12 Vict. c. 36—Removal of fiat.*—A bankrupt's certificate having been suspended for two years, and the commissioner having refused any protection, a creditor, who had not proved, sued the bankrupt for a debt of £300; and having obtained judgment, took him in execution. The bankrupt applied to the commissioner to order his release, but the commissioner refused to interfere. The bankrupt then petitioned the Vice Chancellor, sitting in bankruptcy, for the removal of the fiat to another commissioner, or to London; but, it appearing that the bankrupt had refused an offer made by the creditor to release him on the payment of £75, his honor refused to interfere. *Ex parte Bates re Bates*, 13 Jur. 250.

Per Knight Bruce, V. C.: "When the matter was before the court on a former occasion, I was not aware of Mr. Upton's offer to release the bankrupt upon payment of the sum of £75, in lieu of a debt of £300, on which he is held in prison. Whether, in the absence of Mr. Upton's affidavit, I should have thought myself able, or should have considered it right to interfere in any manner, or to any extent, I need not say. But that affidavit having been added, and its contents standing uncontradicted, as they do, I think it would not be right to interfere. Without considering whether there is capacity to interfere, I dismiss the petition, with costs, not exceeding £4, as between Mr.

Upton and the bankrupt; and as to other parties, the petition is dismissed without costs."

2. *Special case—Statements in—Evidence merely should not be stated.*—A special case should state the conclusion of facts found by the court below, and not the evidence by which the facts were proved: therefore, where it sets forth the evidence by which a certain fact was attempted to be established in the court below, accompanied by a conclusion stated as the inference of the court drawn from the evidence, it is not within the 1 & 2 Will. 4, c. 56, and this court has no authority to draw any conclusion from the facts stated. *Ex parte Nash re Nash*, 13 Jur. 292.

Per Lord Chancellor: By the 1 & 2 Will. 4, c. 56, s. 3, the only appeal given to the Lord Chancellor from the Court of Review is "on matters of law and equity, or on the refusal or admission of evidence only;" and the appeal is to be "on a special case, and in no other mode whatsoever, except the Lord Chancellor shall in any case otherwise direct;" which case is to be approved and certified by the judge of the Court of Review in matters arising in the said court, and by the judge trying the issue in matters arising out of the trial of issues, "and the determination of such judge on the settlement of such case shall be final and conclusive." These enactments are sufficiently explicit, and their obvious meaning is in conformity with what is known to all who are cognisant of the injuries intended to be remedied by making appeals in bankruptcy upon a *special case*. The Lord Chancellor has no duty thrown on him to consider the effect of the evidence to establish any fact, except as to the question of the admissibility or exclusion of evidence. The case is to state all the facts necessary to raise any question of law or equity, which statement is to be conclusive. It follows, as laid down in *ex parte Wilson* (3 Deac. 214), that the case should state the conclusion of facts found by the court, and not the evidence by which the facts were proved."

3. *Proof—Salary—Secretary of company—Set-off—Doubtful claim—Shareholder.*—A secretary of a railway company tendered proof for salary. He was reported by the commissioner to be a debtor on deposits on shares. He petitioned to have his proof admitted, and the court made an order accordingly, leaving the assignees of the company to establish their claim against him, as a shareholder, by action or suit. *Ex parte Green re The Tring, Reading, and Basingstoke Railway Company. Ex parte Clarke re Same*, 13 Jur. 275.

Per Knight Bruce, V. C.: "Notwithstanding the complexion of this projected scheme, fraud is not imputed, it having been treated on both sides merely as an unsuccessful and unfortunate

adventure. The case being so constructed, I am left without option on the question of Mr. Green being a creditor and entitled to be paid out of the existing funds, subject only to the cross question raised of the sum claimed from him in the character of a holder of shares. Now, that latter claim is too doubtful and obscure for the court to recognise, and it must leave the respondents to establish that claim, if so advised, by an action or suit. The court cannot decide that in their favour. Meantime, at least for a limited period, it will be proper to retain in hand an amount corresponding with the salary claimed and found fairly due."

CASE.

Statement in decree — Choice of court. — When a defendant demands a case, the court will preface the decree directing the case with a declaration to that effect. The plaintiff has the choice of the court of law. *Walton v. Holt*, 13 Jur. 355.

See *Stewart v. Forbes*, 12 Jur. 968; 13 Jur. 5.

CHARITY.

Conveyance under 11 Geo. 4, and 1 Will. 4, c. 60—Surviving trustee dead.—By s. 23, of 11 Geo. 4, and 1 Will. 4, c. 60, where all persons in whom any land may have been vested in trust for any charity, or charitable or public purpose, shall be dead, the Court of Chancery may, on the petition of the persons administering the same, or of any person on behalf thereof, direct any Master or other officer of the court to cause two successive advertisements to be inserted in the *London Gazette*, and in one or more of the newspapers circulated in the county, city, or place, where such land shall be situated, giving notice, that the representative of the last surviving trustee do within twenty-eight days appear or give notice of his title to such Master or other officer, and prove his pedigree or other title as trustee; and if no person shall appear to give such notice within such twenty-eight days, or the person who may appear or give such notice, shall not within thirty-one days after such appearance or notice prove his title to the satisfaction of such Master or other officer, then the court may appoint any new trustees for such charity, or charitable or public purposes, and such land may be conveyed to such new trustees by any person whom the said court respectively may direct for that purpose, by virtue of the provisions in the act, without the necessity of any decree. In a late case, it appeared that land given to a charity became vested in a surviving trustee, upon whose death the legal estate descended on his co-heirs in gavelkind. The charity petitioned, under the statute, that the Master might appoint some proper person to convey the legal estate, and the court made an order directing the insertion of advertisements for the co-heirs to appear and prove their title within a limited

period, and, failing to do so, that the Master should appoint some proper person to convey. In *re Belke's Charity, and of the act* 11 Geo. 4, and 1 Will. 4, c. 60. *Ex parte The Society for Promoting Christian Knowledge*, 13 Jur. 517.

See *Nightingale's Charity* (3 Hare, 336; S. C. 8 Jur. 1005) where Vigram, V. C., sent a reference to the Master, which, however, was upon very obvious points, and, consequently, inexpensive.

COSTS.

1. *Administration suit—Assignees of shares—Joining in answer—Several answers.*—Where one of a class of persons interested in a testator's residuary personal estate files a bill for its administration, the general costs of the suit are to be satisfied out of the fund generally; but where some of the parties beneficially interested have incumbered or absolutely assigned their portions of the fund, the costs of the assignors only will be allowed, the same to be paid to their assignees respectively, and the rest of the costs incurred by the assignees must be satisfied out of the assigned shares respectively. Defendants to a suit in the same interest ought to join to answering; but there is no rule of the court which compels them to do so, and it is left entirely to the honour of counsel and the solicitors of the court to exercise a discretion as to whether parties defendants shall join in their answers, or put in several answers to a bill. *Greedy v. Lavender*, 18 Law Journ., N. S., Chanc. 62.

Per M. R.: "If this had been a mere suit in which all the parties interested had appeared, they would all have been entitled to their costs; but the case becomes a different one, when there has been a dealing with the funds, and some of the parties have, whilst others have not incumbered their shares. Additional costs having been incurred by the former, it would be unjust to place the former on the same footing with the latter. If I have rightly understood *Jenkins v. Bryant* (not reported), decided by the V. C., it lays down a very reasonable rule, and is a sufficient authority to act upon for giving costs to the assignor only, and none to the assignee, and I must adopt it in those cases where there has been an assignment executed, and give the costs of the assignor. It appears that the parties in the same interest put in their answers, some jointly and others separately; and it is the duty of parties in the same interest, where they can, to join in their answers, but there is no rule of practice that compels parties to do so. A discretion is to be exercised in such cases. * * Cases occasionally occur where it is impossible to determine whether it is proper or not for parties to join; and in the course of my experience, I never met with an instance in which I could undertake to decide that the

parties ought to be punished for not joining. In the cases of assignment the costs to be given to the assignor will be such costs as he is entitled to as one of the parties beneficially interested under the bequest, and those costs must be paid over to his assignee. As to the incumbrancer, the case is different; and the incumbrancer in each case will have such part of his costs as the costs of the assignor do not cover, out of the particular share of the fund the subject of the incumbrances." See as to trustees severing in defence, *Webb v. Webb*, *infra*.

2. *Trustees—Severing in defence.*—Two trustees severed in their defence; one was charged with misconduct, but not the other. The court allowed only one set of costs, and gave the whole of them to the innocent trustee. *Webb v. Webb*, 16 Sim. 55; S. C. 17 Law Journ., N. S., Chanc. 13.

See as to defendants in general severing in defence, *Greedy v. Lavender*, *supra*.

3. *Executors and administrators accounts falsified—Fraud.*—In *Flanagan v. Nolan* (1 Moll. 84), L. C. Hart observed: "If the account of the executor is falsified, if anything like fraud appears, then the Court gives costs against him." Again, in *Travers v. Townsend* (1 Moll. 496), the same judge says: "I have often heard it laid down as a principle by some of the greatest judges, that an executor, though in the result made answerable for default, by reason of loss incurred through neglect, or chargeable with interest for retaining money in his hands, yet, if there was nothing beyond such negligence or retention of money against him, he is still entitled to the costs of the suit. * * In *Raphael v. Boehm* (13 Ves. 590), the executor was charged with compound interest, but he got his costs. The Court does not visit the improper holding of money, if there is nothing more, further than by charging the executor with interest; but if his account is falsified, if anything like fraud appears, then the Court gives costs against him." These rules were acted on in *Heighington v. Grant* (1 Phill. 600; S. C. 10 Jur. 20), and still more lately in Ireland, in the case of an administrator. In this last case, an administrator, having by his answer put forward accounts which were completely falsified, was charged with the costs of the suit. *Orr v. Milliken*, 1 Irish Jurist, 217.

Per L. C.: "Before the bill was filed, the administrator had been applied to for an account; that which he gave corresponded with that in his answer, admitting the moneys which he had received, but making charges which swallow up the whole fund. One allegation is, that he bore the whole expense of maintaining the plaintiffs, and that in effect they are not entitled to receive any money, but that they would have been by this time in his

debt, not be in theirs. The answer alleges that he carried on the business of the public-house, and advanced money for that purpose and for their support. Now, that answer and that account have been falsified in every particular. One witness swears that all those expenses were borne out of the profits of the establishment. What is the meaning of "*profits*?" It clearly means the net proceeds, after paying the outgoings. In the common import of words, profits must mean that the establishment paid its own expenses and produced a fund out of which he maintained the children. I never have seen the account of an administrator more falsified; his only equity is, that he kept no books; but it was his duty to keep them; he ought to be able to produce regular accounts. It is manifest, that before the bill was filed he made a similar claim. I should hold out a terrible example to executors, if I decided that the miserable fund of these infants should be swallowed up by the costs of falsifying this account. This Court is slow to charge executors, but it is not to allow them to put forth what accounts they please. I do not think I ever saw a case call more for its interference. The defendant must pay the entire costs of this suit."

DEMURRER.

Defendant in contempt cannot file demurrer—Waiver of irregularity.

—It is irregular for a defendant in contempt for want of an answer to file a demurrer and answer; and a plaintiff, by taking an office copy thereof, does not waive his right to have it taken off the file for irregularity. *Attorney General v. Shield*, 13 Jur. 330.

The Master of the Rolls said that he was of opinion that the plaintiff had not waived the irregularity by taking an office copy of the demurrer and answer; and he ordered it to be taken off the file with costs (See *Anon.* 15 Ves. 174; *Taylor v. Milner*, 10 Ves. 445; *Woodward v. Twynaine*, 9 Sim. 301). As to defendant in contempt not filing demurrer or answer, see *Curzon v. De la Zouch*, 1 Swanst. 193; *Vigers v. Audley*, 2 Myl. and Cr. 49.

DISMISSAL.

1. *Bankrupt—Defendant may dismiss—Costs.*—A defendant, who has become bankrupt, and is in a position to move to dismiss for want of prosecution, is entitled to the order to dismiss *with costs*. And, *semble*, this right does not depend upon circumstances, but is the general rule. *Blackmore v. Smith*, 13 Jur. 218.

Per Lord Chancellor: "All the cases seem to go upon the case of *Monteith v. Taylor* (9 Ves. 615). The point must have been decided in that case, for there was nothing in contest but the question of costs. I should like to ascertain what was done in

that case, and shall desire search to be made in the registrar's book." On a subsequent day his lordship stated, that he had caused inquiry to be made into the correctness of the report of *Monteith v. Taylor*, and he found that the result as stated at the end of that report, under the date July 12th, was perfectly correct; the effect of which was, that Lord Eldon decided that either the plaintiff should speed the cause or pay the costs; so that if the plaintiff chose not to go on, he was bound to pay the costs. That he was of opinion that the order in the present case was inconsistent with that decision, and that the bill should have been dismissed with costs.

2. *Motion to dismiss pending an order to amend made at the hearing.*—Where a cause has stood over at the hearing, with liberty to the plaintiff to amend, the proper course is to move upon notice, that the plaintiff amend within a time stated, or the bill be dismissed. During the pendency of an order to amend, the common order to dismiss for want of prosecution would be irregular. *Emerson v. Emerson*, 18 Law Journ., Chanc. N. S. 50; S. C. 12 Jur. 973; 6 Hare, 442.

Wigram, V. C., observed that an order to dismiss simply would be irregular pending an order giving leave to amend.

3. *Upon payment of debt and costs—Allowance or disallowance of costs—Disclaimer—Dismissal.*—Upon a motion by a defendant in a creditors' suit to dismiss upon payment of the plaintiff's debt and costs, the costs being in dispute, the court made the order to dismiss with special directions to the taxing master as to the allowance or disallowance of certain classes of costs. *Kenny v. Beavan*, 18 Law Journ., N. S., Chanc. 64.

Per Wigram, V. C.: "The general rule is, that a defendant, coming to stay a suit before the hearing, must give the plaintiff all he claims; but that rule applies to the plaintiff's claim in the suit. The point here in dispute is collateral. If the court should refuse to entertain the question now, namely, what costs were properly incurred, the same question, after much expense, must eventually come before the court with no better materials for decision. Although, therefore, I doubted at the hearing of the motion whether I ought now to decide it, I think it a case in which it would be proper to do so. Then, as to the merits, the plaintiff ought, on the coming in of G.'s disclaimer, to have himself dismissed the bill, instead of which he occasioned the increase of costs by opposing Gardner's motion to dismiss. The proper order will be that the bill be dismissed on payment of the plaintiff's debt and interest, and the costs of the suit, including the costs of the motion to dismiss the bill for want of prosecution, with a special direction to

the Master that in taxing the costs he is not to allow any costs caused by the plaintiff opposing G.'s motion to dismiss. The offer of the defendant B. on the 20th of October, after attachment issued, to pay costs, even if he had offered to pay all that he ought to pay (of which I am by no means satisfied), could not deprive the plaintiff of the subsequent costs, including the costs of the present application."

4. *Old practice*.—A cause was put at issue, according to the old practice, more than two months before the Orders of May, 1845, came into operation, but no further proceeding was taken in the cause. It was held that the defendant could not move to dismiss the bill for want of prosecution, under the 114th order, rule 4, but must set down the cause for hearing according to the old practice. *Griffith v. Griffith*, 16 Sim. 35; S. C. 12 Jur. 1081.

The Vice-Chancellor of England said, that as the two months had expired between the time when the subpoena to rejoin was served and the time when the Orders of May, 1845, came into operation, the case was not within those orders, but the defendant ought to have set down the cause for hearing according to the old practice.

EVIDENCE.

Suppression of depositions—Interrogatories leading.—The court will not make an order to suppress depositions, on the ground that some of the interrogatories which elicited the depositions were leading, unless it be shown what part of the depositions is an answer to the leading interrogatory, and then only so much as is an answer to the leading interrogatory, will be suppressed. That a deposition is not evidence, is an objection for the hearing, and not to be taken by motion to suppress interrogatories. *Kirkwood v. Lloyd*, 1 Irish Jur. 225.

Per Master of the Rolls: "This is an application which is seldom made, and I do not recollect such an one since I sat in this court. According to the English cases, this motion is not regularly brought forward. The course in England is to refer it to the Master to report which or what part of the interrogatories is leading, and the depositions in answer to the leading interrogatories, or the part of the deposition which is in answer to the leading interrogatory is ordered to be suppressed. Here the application is ordered to suppress the whole of several depositions; and counsel does not argue that more than one interrogatory is leading. I shall not entertain such an application, that because a few lines in an interrogatory are leading, the whole of several depositions is to be suppressed. The objection in this case is evidently mistaken, it really being that some of the depositions are not evidence; and this is an objection which should be made at the hearing."

INJUNCTION.

1. *Extending injunction to stay trial—Plea of fraud.*—On the 29th February, 1848, an action on a contract was commenced by writ of summons. On the 9th of January, 1849, declaration is delivered :—7th February, the pleas are delivered but no pleas of fraud ; 24th February, bill filed by the defendant at law to set aside the contract sued upon, on the ground of fraud, praying injunction. On the 8th March, after notice of trial for the 21st was served, defendant at law obtained leave to add a plea of fraud in the action. Motion to extend the common injunction to stay trial refused. Observations on adding the plea of fraud to make the issue at law and in equity the same. *M'Lure v. Ripley*, 13 Jur. 353.

Per L. C. " There is nothing whatever to explain to me, the period of the assizes being, of course, known to all the parties, why the case was not brought forward sooner ; but that fact of the plea on the 8th March leads me to suspect that it was put in simply to enable the parties to make this application. The result, therefore, is, that it is brought almost immediately within the dates of *Thorpe v. Hughes* (3 Myl. and Cr. 742), excepting that there is more delay here than there was in that case. If it stood merely on the date of the 24th February, the case of *Thorpe v. Hughes*, would be quite conclusive upon it ; but, as I take the date of the 8th March, which I think is a fair way of looking at the dates—it is a case much stronger against extending the injunction to stay trial than *Thorpe v. Hughes*. The party has not brought his case within any of the authorities which lay down the rule for this purpose. Then, what is the balance of inconvenience between the two cases ? If the party is actually minded to try this question at law in the shape of a plea of fraud, it may happen that the trial may not be such as to lead to a satisfactory conclusion on that issue, but it will enable the plaintiff at law to get the benefit of a judgment, and secure that debt which he seeks to recover ; not to obtain the payment of a debt, for the injunction protects him against that, but it will enable the court to deal with the subject matter in contest to which the parties are entitled. That being the case, if I extend the rule of the court which has hitherto been acted on, and prevent a trial taking place, am I sure that, in September next, there will be the same opportunity to secure the matter in dispute for the benefit of the party ultimately entitled. It may or may not be so ; but there is no ground that I can act on, in assuming that that will be so. I find, therefore, the party making the application does not bring himself within the rule established by authority. I see much greater danger in suspending the trial at law than there can possibly be in permitting it to go on, and, therefore, the order of the Vice-Chancellor must

be discharged, and liberty given to the parties to proceed with the trial."

2. Amendment putting an end to injunction.—An information was amended by adding a plaintiff; it was held that an injunction previously obtained was thereby lost. *Attorney-General v. Marsh*, 13 Jur. 317.

Per V. C. of England: "I remember that Lord Eldon expressed an opinion, that if an injunction was granted and the bill dismissed, it would be necessary to make a separate order to dissolve the injunction. I apprehend he was speaking of those which are absolute in form, and not of those which are made absolute, and which are dissolved upon a contingency. I use that language with reference to this injunction. This is granted 'until the said defendant shall fully answer the said information and bill, or our said court make further order to the contrary.' But the plaintiffs who took the injunction have made it impossible for the defendant to answer the information and bill, because, by the addition of a party, the old information and bill does not exist—it has been metamorphosed into a new thing; and, therefore, the mode in which the old injunction was sustained no longer exists. It appears to me, that, inasmuch as this information has been amended—for I do not put it upon the ground of the demurrer having been allowed—it has become impossible for the defendant to avail himself of the contingency mentioned in the order for the injunction. It must not be understood that I am thereby desirous of letting the sale take place, for I will give the plaintiff's leave to give short notice of motion for an injunction."

LEGACY.

Payment to solicitor—Authority.—A general written authority by a foreigner and his wife resident abroad, to a solicitor in this country, to take all necessary measures for obtaining payment to the wife of a legacy, which had been paid into court under the legacy duty act: held, upon the petition of the husband and wife to authorise payment to the solicitor. *Ex parte De Beaumont*, 13 Jur. 354.

MOTION [*ante*, p. 12].

Party unnecessarily served—Costs.—There was a mistake made by the reporter in the case of *Major v. Major*, stated *ante*, p. 12. The decision there proceeded entirely on the peculiar circumstances attending the application, and in no way referred to the general rule, as settled by the authorities, and the effect of which is stated in an extract from Daniell's Practice, p. 1466. The general rule will, therefore, be as stated by Mr. Daniell. *Major v. Major*, 13 Jur. 202.

PARTIES TO SUITS.

1. Public company—Suit by some shareholders on behalf of them.

solves and the other shareholders.—Though some relaxation has been made in the strict rules of courts of equity as to parties to sue in cases of corporations, and the members have been in some instances allowed to sue on behalf of themselves and the others, yet the exceptions do not extend to the cases in which the whole company or corporation is interested, and has expressed its assent, nowhere the act complained of is sanctioned by a majority, or is equally injurious to the whole body. For in all these cases, the relief sought by the plaintiffs must be adverse to the other shareholders, who, therefore, ought to be made defendants. In fact, the relaxation of the strict rule as to parties must be confined to those cases where there is an evil complained of common to the plaintiff and others, *i. e.*, where the interest of the plaintiff and those for whom he sues is identical (see *Foss v. Harbottle*, 2 Hare, 461; *Mosley v. Alaton*, 1 Phill. 790; S. C. 11 Jur. 315, 317; *Exeter and Crediton Railway Company v. Bullen*, 11 Jur. 527, 532; *Lord v. Copper Miners Company*, 12 Jur. 1059; *Walworth v. Holt*, 4 Myl. and Cr. 619; S. C. 5 Jur. 237; *Pract. Eq.* 67—70). This statement will enable our readers to better understand the principle on which the following decision rests:—A resolution was passed by a company that new shares should be created, and the capital so raised to be applied in payment of the then mortgage debt of the company. The company afterwards leased their line to another company, with the approbation of the shareholders. Liabilities incurred by this arrangement pressing on the company, the directors proposed to apply the calls of the new shares in discharging them. Two holders of the new shares filed a bill, on behalf of themselves and the other new shareholders, except seven, who with the company were made defendants, to enforce the application of the calls of the new shares to the purpose originally intended. The company demurred for want of equity, and the same was allowed. *Fetts v. the Norfolk Railway Company*, 13 Jur. 249.

Per Knight Bruce, V. C.: “Upon the question of equity I am not sure, that, independent of recent authorities, which have been cited at the bar, I should not have held the demurrer sustainable; but those decisions, and the judicial opinions expressed in respect of them, are, as it appears to me, inconsistent with sustaining the bill. Whatever course I should have taken in a different state of the authorities, it is needless to say; but I repeat that, independent of those authorities, I am not sure I should not have held the demurrer sustainable; and I allow the demurrer.”

2. *Joint and several obligors and sureties in bonds*—*Trustees—Breach of trust—Dismissing at hearing as against one defendant*—32nd order of August, 1841—*Decree—Assignees of bankrupt*.—By the 32nd Order of August, 1841, it is provided “that in all cases in which

the plaintiff has a joint and several demand against several defendants, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable." It has lately been decided that where a *cestui que trust*, having the option, under the 32nd Order of August, 1841, to proceed either against all, or some only of a number of trustees, jointly and severally liable for a breach of trust, elects to proceed against all, he will not, at the hearing, be allowed to have his bill dismissed as against one defendant, and take a decree as against the others. Therefore, where, in a suit so framed, one of the trustees became bankrupt after the cause was at issue, the court refused to make a decree against the others, but ordered the cause to stand over that the assignees of the bankrupt might be made parties by supplemental bill. *Fussell v. Elwin*, 13 Jur. 333.

Sir James Wigram, V. C., after stating that he assumed for the purposes of the observations he was about to make, that the case was one in which the plaintiff was not bound to proceed by an administration suit, said, that the executors appeared to have committed a breach of trust, for which they were jointly and severally liable; and that the 32nd Order of August, 1841, had, in such a state of circumstances, given the *cestuis que trust*, who had been injured by the breach of trust, an option to proceed either against all the executors, or against some or one of them. In the present case the plaintiff had exercised that option by filing a bill against all. If, at the hearing, the plaintiff had desired arbitrarily to have the bill dismissed as against some or one of the defendants, and to take a decree against the others, such an application would have been refused. The court, in such a case, would have said, "You have filed your bill against all; but, if you had originally elected to file your bill against some or one only, those against whom the bill was filed might have proved a case to show why they should not be so dealt with." Many cases admitting of such a defence might be suggested. In the principal case the suit had come before the court for hearing; and, for anything that appeared upon the proceedings, there was no reason why a decree against all the defendants should not be made. It was said, however, by counsel, and admitted on all sides, that one of the parties had become bankrupt. That being the case, the common course was, not to require evidence of the fact, but to let the case stand over, to bring the assignees before the court by supplemental bill. The plaintiff, however, resisted the adoption of this course, and insisted that, as the bill might have been filed originally against some only of the defendants, he was certainly entitled to take a decree against the persons named as defendants other than the bankrupt. The

- Vice-Chancellor then observed, that he was not of that opinion, but that the cause must be dealt with in the usual way, by directing it to stand over, for the purpose of making the assignees of the bankrupt parties by supplemental bill."

PAUPER.

Dismissal of bill—Costs.—The plaintiff having obtained an order to dismiss his bill as against a pauper defendant, it was held that the defendant was entitled to pauper costs only and not to full costs. *Ruberry v. Morris*, 18 Law Journ., N. S., Chanc. 72.

The Vice-Chancellor had decided the contrary, but upon appeal the Lord Chancellor reversed his order, and held, that the defendant was entitled to pauper costs only, and not to full costs.

- See *Rattray v. George*, 16 Ves. 233; *Dean v. Russell*, 1 Dick. 427; *Stafford v. Higginbotham*, 2 Keen, 147; S. C. 6 Law Journ., N. S., Chan. 314; *Roberts v. Lloyd*, 2 Beav. 376.

PERPETUATING TESTIMONY.

Bill for not allowed where matter can be tried—Heir-at-law and devisee.—The object of a bill to preserve and perpetuate testimony being to prevent the danger of the loss of such testimony *before* the matter to which it relates can be made the subject of judicial investigation, it is a rule of courts of equity not to allow such a bill where the matter in controversy can be made the subject of immediate judicial investigation by the party seeking to perpetuate testimony (2 Story's Eq. Jurisprud. ss. 1505, 1508; *Dorset v. Girdler*, Prec. Chanc. 531; Princ. Eq. 450). Thus in *Angell v. Angell* (1 Sim. and Stu. 89), the Vice-Chancellor of England said: The jurisdiction which courts of equity exercise to perpetuate testimony is open to great objection; first, it leads to a trial on written depositions, which is much less favourable to the cause of truth than the *viâd voce* examination of witnesses, but, what is still more important, inasmuch as those written depositions can never be used till after the death of the witnesses—and are not, indeed, published till after the death of the witnesses—it follows, whatever perjury may have been committed in those depositions, it must necessarily go unpunished, and this testimony has, therefore, this infirmity, that it is not given under the sanction of the penalties which the general policy of the law imposes upon the crime of perjury. It is for these reasons that courts of equity do not entertain bills to perpetuate testimony generally, for the purpose of being used upon a future occasion, unless where it is absolutely necessary to prevent a failure of justice. If it be possible that the matter in question can be made the subject of immediate judicial investigation, no such suit is entertained. His Honour said, that if judgment were obtained in an action against the tenant, it would still be questionable whether it would be binding on the defendant, and alluded to the case of *Dew v. Clarke* (1 Sim. and

there were outstanding terms which prevented actions of ejectment from being brought; and on the judgment in that case, Sir J. Leach says (p. 114), "It appears to me that this bill makes out no case to perpetuate testimony. Although it were true that the validity of the will could not, by reason of the lease, be immediately tried by the devisees in trust, yet it may be immediately tried by an action for rent against the tenant. Testimony can be perpetuated only where by no means the plaintiff can presently assert his title to the property. I must therefore reject altogether the prayer to perpetuate testimony, and consider the bill as if it were not inserted, and not, therefore, multifarious on that account." This subject was much considered in a late Irish case, the circumstances of which were as follows. The bill stated, that in 1838, J. W. made a will, that in 1845 he made another will, by which the former was revoked, that in 1846 the second will was destroyed by the direction of said J. W., and in 1848 J. W. died intestate, and plaintiff, as heir-at-law, entered into possession of all his real estates, and prayed that the evidence of the witnesses to the will of 1845, and of the person who destroyed same, might be perpetuated. Plea, that there were tenants in possession of some of the real estate who had not paid rent to, or acknowledged plaintiff, and the matters in dispute could be immediately tried by action at law against same. Held, that the plea should be allowed, *Lindsay v. Lindsay*, 1 Irish Jur. 218 (over-ruled on appeal, 1 Irish Jur. 289).

The M. R., after quoting from *Angell v. Angell* (*suprà*), also referred to Phillips on Evidence, 8 edit. 514, and Hard. 472, and expressed some doubts as to whether the judgment against the tenant would be evidence against the defendant. He then said, there was another ground in support of the plea stated by counsel, which was of some importance. After the death of J. Lindsay, the defendant entered into possession of the house and demesne, and remained until the 27th of October, and during that interval the plaintiff could have brought an ejectment against the defendant, and tried the question in this manner; but instead of doing so, the plaintiff took forcible possession of the premises. His honour said he considered that a party should not be permitted to take advantage of his own wrong; and, as after the 1st of May ejectments could be brought against the tenants, and the question tried at the next assizes, he was of opinion the plea should be allowed.

Since the above was in type, the decision of the Irish M. R. has been over-ruled by the Lord Chancellor, but this does not affect the doctrine before laid down, the L. C. holding that the plea was bad: 1. Because the tenants might not set up the will in defence, and even if they did, there was nothing to show that the defendant would be bound by the proceedings in that action; 2. The plea was bad, for EQUITY PRAC.]

not negating the existence of any facts, such as a mortgagee being in possession, &c., which, independently of the existence of the will, might be an answer to the action against the tenants. *Lindsay v. Lindsay*, 1 Irish Jur. 289.

Per L. C. of Ireland: "The case of *Dew v. Clarke* (in 1 Sim. & Stu. 108) which was so much relied upon in argument, when examined, will be found not to be an authority in support of this plea, and must be considered with regard to the special circumstances of the case. It is plain that the proceedings at law in that case, if successful, not only might but would have established the right of the party. There was but one tenant, and he had paid rent to one of the devisees in trust. There was privity between the tenant and defendants, and a verdict against the tenant would be admissible evidence against the defendants. The observations of the Vice-Chancellor must be considered as having regard to the circumstances of the case, and are to be taken *secundum subjectam materiam*. The case was totally different from that now before me, in which there is nothing to show that if the plaintiff proceeded against every one of these tenants he could ever obtain a verdict which would establish his title as between him and the defendant. As I have said before, there may be many circumstances which will prevent the real question in this case from being tried in an action against the tenant, and the plea should have negated the existence of these facts. Upo that part of the case there is a very late authority, *Rawlins v. Moss* (6 Hare, 604); there was a bill of revivor, and a plea was put in by the representatives of a deceased defendant that the party whom they represented was never served with a subpoena to appear and answer, and did not appear nor answer the original bill. The plea was over-ruled as bad in substance, for it did not exclude the fact that the deceased person might, by other means, have been bound by the proceedings in the original cause. The Vice-Chancellor, in giving judgment in that case, said, that in order to sustain a plea, the defendant should have shown not only that the deceased defendant had not entered an appearance, but that there had been neither act nor acquiescence on her part nor any other circumstance by which she was bound in the former suit; the averments in this respect were very imperfect. I think the plea in this case is imperfect in not negating the existence of any facts which would prevent the title from being tried in an action against the tenant; it does not reduce the case to a single point. For these reasons I consider the plea is bad, and the order of the Rolls must be reversed."

PRO CONFESSO.

Amendment.—A bill was amended under the 55th Ord. of May.

1846, after an order to take the bill *pro confesso*: Held, that such amendment destroyed the effect of the order. *Weightman v. Powell*, 18 Law Journ., N. S., Chanc. 71.

Per Knight Bruce, V. C.: "I am of opinion that where an order to make an amendment is obtained after an order to take a bill *pro confesso*, the order *pro confesso* is gone—an opinion, however, which I unwillingly entertain."

PRODUCTION OF DOCUMENTS.

1. *Documents not material to plaintiff's case*—*Privileged communications*—*Professional communications*.—The defendant to a bill of discovery, in aid of the defence to an action brought by him against the plaintiff, by his answer admitted the possession of documents, some of which, he said, contained the evidence on which he was advised and intended mainly to rely at the trial of the action, and did not, as he was advised and verily believed, contain any evidence in support of the plaintiff's plea in the action, nor were in any manner material to the plaintiff's case. Others of the admitted documents the answer stated, were private and confidential communications, between the defendant and his legal advisers in the ordinary course of professional business, and all of them related to the matters in dispute between the defendant and the plaintiff in the action. The court ordered the production of the first of the above mentioned classes of documents, but held the second privileged. *Peile v. Stoddart*, 13 Jur. 225.

Per Vice-Chancellor: "The documents comprised in the first part of the schedule may contain evidence for the defendant, but they may also contain evidence for the plaintiff. The defendant states his belief as to these documents, that they do not contain any evidence in support of the plaintiff's case at law; but you cannot test the proof of what is stated to be believed, without referring to the documents themselves, there is no other mode of putting that belief to the proof. The documents, therefore, in the first part of the schedule must be produced; the others are, I think, protected."

NOTE.—The decision of the V. C. of England in the above case of *Peile v. Stoddart*, has been since over-ruled by the Lord Chancellor (see 13 Jur. 373). His lordship said: "I have no doubt whatever the order for production, so far as it relates to the letters from the plaintiff to the defendant, cannot be supported." And still further, the Lord Chancellor expressed his opinion to be, that the documents in question were sufficiently protected by the form of draft in the answer; that it was not as if the defendant had said that he was advised, and therefore believed, &c., but that he was advised and believes, &c., not expressing his belief to be consequent upon the advice, but as a positive conviction of his own mind,

that if he did not believe that which he had so sworn, he would be liable to the penalties of taking a false oath, and he discharged the order of the Vice-Chancellor.

2. *Agent—Entries mixed with other matters.*—In the case of *Freeman v. Fairlie* (3 Meriv. 43) Lord Eldon said: "It is, and it must be understood to be the bounden duty of an executor to keep clear and distinct accounts of the property which he himself is bound to administer; and I have not the slightest difficulty in saying, that if all these books were the books of a banking-house in London, and an executor thought proper to put the accounts of a testator's estate into his banking books, he shall not be allowed to tell me, the *cestui que trust*, that I have no right to see his original accounts of my property. To an executor so acting, I should say they shall see every part of these original books which contain any part of this transaction." In a late case, an agent employed to manage estates (the subject matter of a suit), entered his accounts in books which also related to other estates, and which books were admitted by the defendant's answer to be in his power:—Held, that the plaintiff was not entitled to the production of these books. *Airey v. Hall*, 12 Jur. 1043.

Per Knight Bruce, V. C.: "The present is a very different case from that before Lord Eldon. There it was the party himself who had improperly mixed in his own books different accounts; but here the act is one of a person not a party to the cause. The order must, therefore, not extend to these books, and the motion must be so far refused."

PUBLICATION.

Examinations taken after publication.—A cause was put at issue according to the old practice so long ago as Feb., 1816, but no further step was taken in it until Nov., 1841, when the plaintiff moved to withdraw the replication and file a new one. That motion was refused. In December following the defendant moved to dismiss for want of prosecution. The order then made was, that the plaintiff should set down his cause on a given day, or the bill be dismissed. Before that day arrived the plaintiff examined witnesses. The defendant then moved that the depositions might be suppressed on the ground that they had been taken after publication in the cause had passed according to the new orders of May, 1845. The court refused the motion, and ordered publication to pass on the day before that on which the cause was to be set down. *Thomas v. Lewis*, 16 Sim. 73; see also 15 Sim. 296; 17 Law Journ., N. S., Chanc. 135; 12 Jur. 67.

The V. C. of England said: "When I made the second order of Dec. I meant to leave both parties at liberty to do what, according to the state of the cause, they were at liberty to do. Therefore, unless something has been done in this cause which

amounted to the passing of publication, I cannot say that publication has passed. Nothing, however, has taken place which could amount to the passing of publication; and, therefore, the ground on which I am asked to suppress the depositions does not exist. Consequently, I cannot make the order; but I will direct that publication in the cause do pass on the 14th of Feb. next, the day before the cause is ordered to be set down."

SALE UNDER DECREE.

Bidding—Solicitor—Leave to bid.—Even though a solicitor who has acted in a cause discharge himself, the court will not allow him to bid. *Keogh v. Keogh*, 1 Ir. Jur. 226.

Per Master of the Rolls: "The fact of a solicitor discharging himself from the office cannot justify the court in permitting him to bid, unless upon the consent of all parties to the cause; for if, in general, he were permitted to purchase, he would then acquire an interest in depreciating the value of the property to be sold under the court; also, during the progress of the cause, a solicitor has an opportunity of becoming acquainted with any flaw in the title. My present impression is, that without a consent, I ought not to make this order. Lord Eldon considered that the fact of a solicitor discharging himself does not make any difference."

SUBPENA.

Substituted service on solicitor—Bill of revivor.—Service of subpoena to appear to a bill of revivor ordered to be substituted upon the solicitor of a defendant (abroad) who had acted for the defendant in all the proceedings in the original suit. *Norton v. Hepworth*, 13 Jur. 244.

The Lord Chancellor said, that this case was within the principle laid down by Lord Lyndhurst in *Murray v. Vipart* (1 Phil. 521; S. C. 9 Jur. 173; 14 Law Journ., N. S., Chanc. 517), and that, in fact, the present case was much stronger in favour of substituting service than was the case of *Murray v. Vipart*, because in that case there was merely a letter from the solicitor of the absent defendant, stating that she had instructed him to do what was necessary in the matter on her behalf; but, in the present case, there was the circumstance of the solicitor having actually represented the absent defendant by acting for him through the whole progress of the original suit, and that the bill of revivor related to the same matter. He should therefore make the order substituting service. His lordship also observed, that he quite concurred with Lord Lyndhurst in his opinion that great caution should be used in granting these applications; for that, without due caution in entertaining such applications, it was manifest the greatest injustice might be done to absent parties.

See: Weymouth v. Lambert, 3 Beav. 336; *Hobhouse v*

Courtney, 12 Sim. 149; Cooper v. Wood, 5 Baw. 391; Hensby v. Holmes, 4 Harc. 306; S. C. 9 Jur. 225.

TRUSTEES.

1. *Relief Act, 9 & 10 Vict. c. 96—Costs—Corpus or income.*—Where a fund, in which successive beneficial interests exist, is transferred into court under the Trustees Relief Act, the costs incurred by the trustees in proceeding under the statute are payable out of the corpus, not out of the income, of the fund. *Re Staples Settlement*, 13 Jur. 273.

Per Vice-Chancellor: "As I have the whole fund here, I have jurisdiction over it. The parties who have paid it in are merely executors, and I do not see any other fund out of which I can order costs. If it had been the case of a government annuity, there would have been nothing but the annuity to look to, but here I have the very corpus."

2. 1 Will. 4, c. 60—*Lunatic trustee—Reference to Master—Bombay notes—Transferable property.*—By the Trustee Act, 1 Will. 4, c. 60, the Lord Chancellor is enabled to order a transfer, &c., of property of which a lunatic is trustee. By s. 29, the powers of the act are to extend to all "land and stock." By s. 2, the word "land" extends to any manor, &c., and to property of every description transferable otherwise than in books kept by any company or society, or any share thereof or interest therein. In a recent case it was held that Bombay notes which are transferable by indorsement are within the operation of the above act. *Re Dyer Sombre* 13 Jan 218.

WINDING-UP ACT [See 1 Mag. N. S., pp. 63—65, 167—171].

1. *Pier company not within act.*—A pier company, incorporated by act of Parliament, with power to levy tolls for the use of the pier (including its use as a promenade) to erect baths, quays, wharfs, and warehouses: Held, not so clearly a trading or commercial company as to be within the Joint-Stock Companies Winding-up Act, 1848, which ought only to be applied in plain cases. *Quære*, whether a case at law can be directed to determine if a company is within the act. *Esparis Burge, Re Moors Bay Pier Company*, 1 De Gex and S. 588; S. C. 1 Mag. N. S. 167.

2. *Provisionally registered railway companies within act—Service of petition.*—An order under the Winding-up Act, 1848, made in the case of a provisionally registered railway company. If no office of the company can be found, the court may make the winding-up order on the petition having been advertised according to the act, and upon a consent on the part of some member of the company. *Re Brighton, Lovers, and Tenbridge Wells Direct Railway Company*, 1 De Gex and S. 604.

3. *Mining Company—Cost Book Principle—Inability to pay—*

More disputes—Tests of solvency.—A mining company on the cost-book system, formed before the passing of the Joint-Stock Companies Winding-up Act, is not within its operation. A dispute having arisen between a mining company and one of the shareholders respecting his liability to pay calls, the company procured one of their creditors to bring an action against him. He served notice of the action on the company as required by the act, but they took no steps to stay the action, or indemnify the shareholder, who thereupon presented a petition for the dissolution and winding-up of the company. There were no circumstances to satisfy the court that the company were not in a solvent condition: Held, that although the case came within the strict letter of the act, yet, as the action arose out of the dispute between the shareholder and the company, and not from their inability to pay, he was not entitled under the circumstances to an order for winding-up the concern. Where the tests which are directed by the act to be applied to try the solvency of a company strictly and literally apply to a particular company, but the presumption arising therefrom is rebutted by evidence, so that there is no reason to believe that the company are insolvent, the court will refuse to interfere. *In re the Wheal Lovell Mining Company, ex parte Wilde*, 18 Law J., N. S., Chanc. 139; S. C. 1 Mag., N. S., 168, 169.

4. Company ceased trading—Preliminary inquiries—Suit not affected by order to wind up.—By 11 & 12 Vict. c. 45 (the Joint-Stock Companies Winding-up Act, 1848), s. 5 (7th head) any contributory may petition for the dissolution and winding-up, or winding-up only of such company as is specified in the act, "If any company shall have been dissolved, or shall have ceased to carry on business, or shall be carrying on business only for the purpose of winding-up its affairs, and the same shall not be completely wound up." By s. 58, the act is not to affect the rights of creditors, whether against the company or against any contributories or other persons, nor is it to affect any contracts, &c., "nor any actions, suits, or other proceedings pending at the date of such petition." In a late case it was held that the circumstances that a joint-stock banking company had ceased to carry on business as far back as 1842, and had now no outstanding debts, and that there had been a decree for an account and a contribution between the shareholders, are no reasons why the order absolute for winding-up the affairs of the company under this act, should not be made. An order for winding-up, under this act, does not prevent the prosecution of a decree for an account in a suit; and even a defendant to the suit, who is sought to be charged thereby, may properly be a petitioner under this act. Preliminary inquiries will not be ordered, where it is perfectly clear, and admitted that the company cannot go on. *Ex parte Troutbeck and others, and ex parte Walker*, 18 Jur. 157; S. C. 1 Mag. N. S., 169.

5. *Company dissolved prior to act—Suit pending.*—A company had been dissolved between the passing of the old Winding-up Act, and the new Winding-up Act of 1848, a suit had been instituted under which an order was made, referring it to the Master to take the accounts, and directing payment of the debts of the company. It was held that the company was within the Winding-up Act; and the court made an order for winding-up, but directed the reference to the same Master. *Re Warwick and Worcestershire Railway Co.*; 13 Jur. 651.

6. *Insurance Company—What not a commercial company.*—A registered company for the insurance of agricultural cattle held not so clearly a trading or commercial company as to be within the operation of the Winding-up Act, 1848. *Esparte Spackman* 1 De Gex and S. 599; S. C. 1 Mag., N. S. 167.

7. *Contributory—Executor receiving dividends of deceased shareholder.*—By the deed of settlement of a banking company, executors of deceased shareholders had the option of becoming shareholders on giving certain notice or of selling the shares; and, until the option was exercised, the dividends might be retained by the company as a guarantee fund; in default of any person executing the deed in respect of such shares, after six months' notice, the shares were liable to forfeiture. A shareholder in the company bequeathed his shares to his executor, in trust to convert them into money; the executor sold some of the shares, but did not give the proper notice to make himself a shareholder as to the rest, and was nevertheless permitted to receive the dividends on them for five years, signing the receipts as executor only: Held, that he was not a contributory without qualification. *Armstrong's case*, 1 De Gex and S. 566.

8. *Contributory—Executrix of a deceased shareholder.*—A testator was a shareholder in a joint-stock banking company, which was established under the provisions of the 7 Geo. 4, c. 46, and according to the deed of settlement of which personal representatives of deceased shareholders might become shareholders on giving certain notices; the executrix never gave the prescribed notices, but repudiated all interest in the concerns of the company; by her affidavit, in the course of the proceeding under the Winding-up Act, 1848, she deposed that the testator's assets were under £20, and had all been exhausted in payment of debts: Held, that her name had been properly placed on the list of contributories as executrix. *Thomas's case*, 1 De Gex and S. 579.

9. *Contributory—Father of infant cestui que trust of shares.*—A father purchased in a joint-stock bank, for two infant sons, in the name of their uncle as a trustee, and the uncle's name was so entered on the share register of the company: By an agreement afterwards entered into, the uncle admitted that the father was entitled to the

profits of the shares till the minors became of age, and it was agreed that then the uncle should assign the shares to the two minors, and the father agreed to indemnify the uncle in respect of the shares; the uncle received the dividends, and paid them to the father: Held, that the father's name ought not to be inserted on the list of contributories under the Winding-up Act, 1848. A man may be liable to the creditors of a company without being liable to have his name inserted on the list of contributories. *Fenwick's case*, 1 De Gex and S. 557; S. C. 18 Law J., N. S., Chanc. 112.

10. *Contributory—Father of infant shareholder.*—Shares in a banking company were purchased for an infant without disclosing his infancy, the vendor signing a certificate required by the company's rules that the purchaser was of age; on the discovery of the infancy, the infant's father covenanted with the public officer and two directors of the company that the infant should perform the agreements contained in the company's deed of settlement, and to indemnify the company: Held that the father's name was properly placed on the list of contributories under the Winding-up Act, 1848. *Reaveley's case*, 1 De Gex and S. 550; S. C. 18 Law J., N. S., Chanc. 110; S. C. 1 Mag. N. S., 168, 169.

11. *Contributory—Shares bought without knowledge of party—New and old shares.*—A. bought shares in a company in the names of B. and C. without their knowledge. He made his will, appointing B. one of his executors, who alone proved. D., a member of the company, applied to B. to give up the certificates, and undertook to return him a like number of new shares, and the same were given up, and the old certificates were cancelled. D. sent to B. a smaller number of certificates of shares, registered in the names of B. and C. D., instead of sending certificates representing old shares, sent those representing shares which D. had held, and which had been transferred. On a reference to the Master to wind-up the affairs of the company, he had excluded the name of B. from the lists of contributories, and the court held the exclusion to be right. *Re St. George's Steam Packet Co.*, 18 Jur. 530.

12. *Contributory—Purchase of shares by company—Contributory upon losses up to sale.*—The directors of a brewery company called an extraordinary general meeting of the company, who passed a resolution enabling the directors to buy up the shares of such shareholders as desired to withdraw from the concern, on certain terms. On the winding-up of the company, the Master included on the list of contributories a shareholder who had sold his shares to a nominee of the company, as a contributory, without qualification; but, on appeal the court held that he was only bound to contribute upon losses, &c., up to the time of the sale of his shares; and that the shareholders had acquiesced in the resolution passed at the extraordi-

nary general meeting, and in the sale by the shareholder, which was, in fact, a completion of the arrangement. *Re Morgan, Re Vale of North, and South Wales Brewery, Joint Stock Company*, 13 Jur. 554.

13. *Contributory*—*Husband of a registered shareholder*.—A married woman became, by such description, a registered shareholder in a joint-stock banking company, having purchased the shares with money arising from her separate estate; the husband occasionally received the dividends on the shares, but always signed the receipts as his wife's agent; though not a registered shareholder, he attended some meetings, and once held the proxy of an absent shareholder, which, according to the deed of settlement, a shareholder alone could do, and he took part in the proceedings; previously to the dissolution of the company his name had been substituted, without his consent, for that of his wife in the share register. Held, that he was not a contributory under the act, and his name was, upon motion, ordered to be struck out of the list. *Somble*, that liability to creditors of the company is not of itself sufficient to make a person a "contributory" within the act. *Angas's case*, 1 De Gen and S. 560.

The ground of the Vice-Chancellor's decision was, that the husband's name was not properly placed on the list of contributories there being no evidence that the company ever considered they had any rights in respect of the shares, except as regarded the wife, and that as between the company and the husband, he was not liable, whether or not he was liable to the creditors of the company. On appeal to the Chancellor, he directed the matter to stand over until the result of the creditor's action in the Exchequer should be known; and it seems this has since been decided, acquitting the husband of all liability.

14. *Contributory*—*On whose application a party may be made contributory*—*Shareholder in a banking company who has retired*.—A., a shareholder in a joint-stock banking company, established under the 7 Geo. 4, c. 46, effectually assigned his shares in the company more than three years prior to the winding-up of such company under 11 & 12 Vict. c. 45; it appeared that there was at least one other former shareholder in the same situation: Held, that A. had been properly included in the list of contributories, and that it was no objection that his name had been placed on the list upon motion given by a continuing shareholder: Held, also, that if the certificate of the decision given out by the Master to the party appealing, differ from the statement on the file of the proceedings, the latter is to be assumed to be the actual decision. *Hawthorn's case*, 1 De Gen and S. 571; S. C. on appeal, 1 M'N. and G. 49.

On appeal, the Lord Chancellor affirmed the Vice-Chancellor's judgment, referring to sect. 84 of the act, as showing that the list was to consist of all who were liable to contribute, not of any

particular class only, and that the degree of liability was to be determined afterwards.

15. *Contributory*.—*Laches of directors in not assenting to sale of shares does not exempt vendor from being a contributory*.—Where a shareholder in a company had taken all the proper steps within her power to assign her share, but the directors omitted to assent to, or dissent from, the sale, for a period exceeding two months, and until the company stopped payment: Held, that nevertheless the name of such shareholder had been properly placed on the list of contributories without qualification. *Chard's case*, 1 De Gen and St. 581.

16. *Petitioner*.—*Receiving back part of deposit*.—*Reference to Master*.—*Inspecting accounts of company*.—An allottee of thirty shares in a projected railway company had paid £5 5s. per share deposit. The scheme was abandoned, and £3 10s. per share was returned to the allottee on account of his deposit, and he thereupon signed a memorandum expressing his concurrence in the settlement of the affairs of the company, and his consent to receive £3 10s. per share; and the directors certified that he was entitled to a *pro rata* division of the funds, after payment of all debts, &c., but no accounts were shown to him. A further sum of 10s. per share was afterwards offered to him, upon his signing a release, but he refused. He then presented a petition praying the dissolution of the company, and the winding-up of its affairs; but the court ordered the petition to stand over, the respondents permitting him to examine the accounts, with liberty to bring the matter again before the court, if need be. *Rey. Pascoe, Re London and Manchester Railway Company*, 13 Jan. 598.

17. *Petitioner receiving back part of deposit*.—*Abortive company*.—A projected railway scheme having failed, and the company, though not dissolved, having ceased to carry on any business, allottees of shares received a return of part of their deposits, and in 1847 received a further part, expressing in their receipts for the latter that it was a second and final dividend. An allottee who had so received money, and who was only £22 minus his payments, petitioned under the act, to wind up the affairs of the company; but the court, considering that he had not shown the existence of any circumstances unknown to him at the time of the second dividend, dismissed his petition, but without costs. *Ex. Murrell, Re London and South Essex Railway Company*, 13 Jan. 599.

18. *Contributory*.—*Notice of insertion of name with qualification*.—*Waiver of notice*.—On a notice to a person that her name was inserted in the list as a contributory in a particular character, she attended before the Master by her solicitor, to oppose the insertion of her name altogether: Held, that she did not thereby waive any objection to the sufficiency of the notice for the purpose of enabling the Master to decide that she was a contributory without qualifica-

tion; and the Master who had so decided upon such a notice was directed to review his report. *Quære*, whether in such a case, a new notice can be effectually given. *Hutchinson's case*, 1 De Gex and S. 563.

19. *Contributory*—*Notice to a contributory as executor*.—The brother of a shareholder who died intestate was allowed by the company to receive dividends on the intestate's shares, without administering to his estate, on his signing receipts as representative of the intestate: Held, that it was not competent for the Master, upon a notice to the brother, that his name was intended to be inserted on the list of contributories in his representative character, to insert his name as a contributory without qualification. *Glaholm's case*, 1 De Gex and S. 553; S. C. 18 Law Journ., N. S., Chanc. 147 (affirmed on appeal, 1 Hall and Tw. 123).

20. *Petitioner*—*Pendency of suit to make director personally liable does not preclude him from petitioning to have company wound up*.—It is not a sufficient objection to a petition for winding up the affairs of a company under 11 & 12 Vict. c. 45, that there are no debts due from the company, or that the petitioner is one of the directors against whom a suit in Chancery is pending, seeking to make them personally liable to the shareholders for the losses of the company. *Esparle Walker and esparle Troutbeck*, 1 De Gex and S. 585; 18 Law Journ., N. S., Chanc. 81; S. C. 1 Mag., N. S., 169.

21. *Petition opposed by provisional director*.—On the petition of two provisional directors of a company provisionally registered, for winding-up the affairs of the company, the court made the order, although it was opposed on behalf of another director. *Exp. Hollinsworth*, 13 Jur. 601.

22. *Service of Petition*—*Affidavit of service*.—By sect. 10 of the Act for Winding-up Joint-stock Companies, 1848, it is provided that every petition for winding-up, &c., shall "be served at the head or only office of the company, upon any member, officer, or servant of the company there; or in case no such member, officer, or servant can be found there, then by being left at such office; or in case no such office of the company can be found, then upon any member, officer or servant of the company." In a late case, it appeared that the company had no office, and a petition to wind-up was served on a member of the company, who appeared at the hearing by counsel. The court, nevertheless, was of opinion that it was necessary that before the order could be drawn up, an affidavit of service of the petition should be produced. *Re Tins, Reading, and Basingstoke Railway Company*, 18 Jur. 652.

23. *Appointments of Solicitors*—*Attendance of counsel*—*Petitioner attending Master*.—On an appeal from an order made by the Master, two counsel appeared for the two official managers, and a third

counsel stated that he appeared for one, and that one being present, he was interrogated by the court, and upon alleging that he appeared by that counsel, the court refused to hear the other two on his behalf. Solicitors were appointed by the Master to act for the two official managers, but one of the official managers objected to them, and the court discharged the Master's order relative to their appointment. It is within the jurisdiction of the Master to discharge the person, upon whose petition the order of reference was obtained, from any further attendance upon him in the matter. *Re London and Manchester Direct Independent Railway Company*, 13 Jur. 552.

AMENDMENT [*ante*, pp. 2, 20].

Amending bill by making one of the plaintiffs a defendant—Motion for receiver.—Special leave was given to the plaintiffs to move for liberty to amend their bill, by striking out the name of one of such plaintiffs and making him a defendant: Held, to authorise a motion by such of the parties as were to remain, excluding the plaintiff whose name was to be struck out; and the court made the order, without prejudice to a motion then pending for a receiver in the original cause. *Hart v. Tulk*, 6 Hare, 612.

ANSWER [*ante*, pp. 1—5].

1. *Husband and wife—Reading answer against wife.*—The joint answer of husband and wife may be read against the latter with reference to her separate estate. *Callow v. Howle*, 1 De Gex. and Sm. 531.

V. C. Knight Bruce said that a plaintiff could not compel a married woman in such a case (where the suit relates to the separate property of the wife) to answer separately; and no authority having been cited to the contrary, his honour thought that the joint answer of a married woman and her husband might be read against her, as regarded her separate estate.

2. *Exceptions to amended bill* [*ante*, pp. 2—4].—*Referring on old exceptions—answering amendments and exceptions together.*—There has hitherto been a variance between the practice in the Rolls Court, and in the other branches of the Court of Chancery, in the form of order referring old exceptions for insufficiency of answer to original bill, after the bill has been amended, and the defendant ordered to answer the amendments and exceptions together. The Lord Chancellor has, however, lately directed that the practice shall be uniform, and it is accordingly settled, according to the following certificate of the registrars of the court. *Watson v. Lefan*, 34 Jur. 479.

The following is the certificate, and the order is for the future to conform to it: "The form of order adopted by the registers prior to the Orders of 1828, referring answer where bill has been amended, and defendant directed to answer amendments and exceptions at the same time, &c. &c. (according to the facts of the case). Forasmuch as the court was this day informed, &c., that the plaintiff having taken exceptions to defendant's answer, the defendant submitted to put in a further answer (or the said answer was reported insufficient); that the plaintiff obtained an order for liberty to amend his bill, and that defendant should answer the amendments and exceptions together; that the defendant put in a further answer to the exceptions, and an answer to the amendments (that is, he answered the amendments and exceptions at the same time); that the answer was again reported insufficient; since which the defendant has put in a further answer, which the plaintiff is advised is also insufficient (since 1828 we add, upon the exceptions, Nos. 1, 2, &c., taken by the plaintiff to the said answer, sect. 7 of the General Orders of 1828): it is thereupon ordered that it be referred to the Master to look into the plaintiff's bill, the defendant's answer, and the plaintiff's exceptions, and certify whether the defendant's answer is sufficient or not. (Since 1828 we add, upon the exceptions, Nos. 1, 2, &c., taken by the plaintiff to the said answer, sect. 7 of the General Orders of 1828)."

APPEAL [*ante*, p. 4].

Consent to waive issue—Effect of waiver.—Where parties have, in the inferior court, consented to waive an issue, can the appellate court, being of opinion that an issue is necessary to enable it to come to a satisfactory conclusion, be called upon to decide the case? *Stewart v. Forbes*, 13 Jur. 523.

Per L. C.: "The question in this cause being, in what shares the plaintiff and the defendant were interested in the partnership carried on by them from 1830 to 1840, it is obvious, that when the cause was originally heard before the Vice-Chancellor, the case might have appeared so clear, either for or against the plaintiff's proposition, as to enable the court to dismiss the bill, or to decree for the plaintiff on the evidence produced; or it might have appeared so far doubtful as to have made it the duty of the court, in the exercise of its usual practice, to direct an issue. Both parties deprecated the latter course, and the Vice-Chancellor, kindly wishing to comply with the request of both parties, took upon himself the duty—not entering into his functions as a judge in equity—of deciding on a matter of fact which he must have been of opinion was proper for the decision of a jury. In a celebrated case of legitimacy, Lord Lyndhurst adopted a similar course

and, upon appeal to the House of Lords from his decision, the House thought itself bound to consider and decide upon the case so entertained by the Court of Chancery, though not according to the usual course of its jurisdiction. I did not, therefore, feel myself at liberty to decline hearing the cause, although the parties had, by their consent recorded in the decree appealed from, precluded themselves from asking for, or me directing, an investigation of their claims before a jury—the only proper tribunal for the purpose—if the matter were really one of doubt; besides which, I thought that the plaintiff ought to be permitted to show, if he could, that what he claimed was so free from doubt as to entitle him to the decree which he now asks, without the intervention of a jury; in which case the consent would not prejudice his claim. If it were necessary, in this case, to consider whether parties, by their consent or other acts, could, on a rehearing or upon appeal, call on the court to decide on a matter which, in the usual course, would be referred to another tribunal, I should probably not have been disposed to have assumed that duty, except so far as the House of Lords informed me that I ought to do so. That question can only arise in matters in which the case appears to be so doubtful that the judge of the court of equity finds that he cannot, on the materials before him, come to a satisfactory conclusion. It does not arise in the present case, because I am of opinion that the plaintiff has failed in making out his case; and whether, if there had been no such consent as stands recorded, I should at once have dismissed the bill, or after tendering to the plaintiff an issue, he declining to take it, I should not have felt any difficulty in coming to a satisfactory conclusion without the assistance of a jury.

BANKRUPTCY [*ante*, pp. 4, 20].

1. *Assignees prosecuting suit to set aside a partnership between bankrupts and a third person.*—A joint fiat in bankruptcy was issued against two partners, pending a suit by one of them against the other and a third person who had previously retired from the business, to set aside the partnership agreement on the ground of fraud and misrepresentation on the part of both defendants, and for repayment of the monies which the plaintiff had brought into the concern under that agreement. The assignees obtained leave from the Court of Review to prosecute the suit against the retired partner, and they proceeded by supplemental bill, in which the creditors' assignees were plaintiffs and the official assignee of the retired partner were defendants: Held, that the creditors' assignees, who represented not only the original plaintiff on whose behalf relief was sought, but also the bankrupt partner, who was an original defendant, against whom relief was sought, could not sustain the suit against the retired

partner. *Semble*, that in such a case the suit might have been prosecuted by assignees appointed to represent the separate estate of the plaintiff in the original suit. Whether, if it had appeared in evidence in the suit that the defendant, the retired partner, was alone or otherwise answerable for the fraud, the court could in such a case have made a conditional decree, imposing terms upon the plaintiffs as representing the bankrupt, who was originally charged as defendant, *quære*. *Robertson v. Southgate*, 6 Hare, 536.

2. *Equitable mortgage—Plant and fixtures—order for sale—Title-deeds*.—Title-deeds of a leasehold brewery were deposited with a creditor as a security for a debt; the debtors signed a letter to their own solicitor, stating that the deeds were deposited as a security for the debt; and by previous letters the debtors had proposed the brewery demised by the lease, and the plant and fixtures, as a security; the debtors became bankrupts: Held, the bankrupt's assignees declining to bring an action for the recovery of the deeds, that the creditor was entitled to a security on the whole; and on a petition, the usual equitable mortgagee's order was made. *Exp. Chuck, re Keen*, 13 Jur. 531.

3. *Act of bankruptcy—Absconding—Denial to creditors*.—Two partners, who had carried on business and resided together at a particular place, being in embarrassed circumstances, dissolved partnership, and for a short time continued still to reside together at the same place. Afterwards one removed to another place of residence, which he did not disclose, but directed his letters to be sent to a post-office; and the other partner called a meeting of the creditors of the late firm, at which the former refused to attend, but his solicitor did so, and a fiat was issued against the two: Held, on a petition to annul the fiat, presented by the partner who had so refused to attend the meeting, that he had not committed an act of bankruptcy, and the fiat as to him was annulled, but without costs. *Exp. Addison, re Hooper*, 13 Jur. 601.

BILL [*ante*, p. 6].

Service of copy bill under 23rd Order of Aug. 1841.—It is not compulsory upon a plaintiff, in serving a copy of the bill under the 23rd Order of August, 1841, to omit the interrogatory part of such bill *Mason v. Baest*, 18 Law Journ., N. S., Chanc. 105.

The V. C. said, as the words "at liberty" were found in the order, he did not think it was compulsory upon the plaintiff to omit the interrogatory part.

COSTS.

1. *Amendment of bill—Payment in lieu of security to Record Clerk*.—An order made upon notice for leave to the plaintiffs to amend their bill, giving security to the Clerk of Records and Writs for the costs of the defendant's suit already incurred, was varied

experts by directing the costs of the defendants to be taxed and paid to them by the plaintiffs, reserving the question how they were ultimately to be borne; the variation not being such as could prejudice the absent defendants. *Hart v. Talk*, 6 Hare, 611; S. C. 18 Law Journ., N. S., Chanc. 162.

Per Wigram, V. C.: "The order for leave to amend was obtained on the 10th of February, and was in the terms above stated. The costs at that time incurred by the defendants in this being under 60s., the plaintiffs applied on the 19th for leave to vary their order, by paying the amount into court, or to the defendants, upon the grounds that the expense of giving security would be greater than the amount of costs. I found upon inquiry that the practice was either to pay or to give security, and I thought that, in such a case as the present, I might vary the order as required, exercising the same discretion as in varying orders of service, when such variation will not be less beneficial to parties than the original orders. I still think that the court has this discretionary power to vary its orders."

2. *Mortgage—Trustee, reconveyance—Costs of redemption—Petition under 1 Will. 4, c. 60.*—A mortgagee devised the mortgaged estates to three trustees, one of whom could not be found: Held, that the costs of the petition, under 1 Will. 4, c. 60, for a reconveyance, were to be borne by the mortgagor. *King v. Smith*, 18 Law Journ., N. S., Chanc. 43

Per Wigram, V. C.: "*Prima facie* the rule is, that the expense of a reconveyance of mortgaged property must be borne by the mortgagor. The principle by which Sir John Leach was guided was, that where a party mortgages his estate, it is incident to the right of the mortgagee to deal with the property for his own benefit, and therefore to deal with it in the ordinary way as other property. The question came before the Lord Chancellor in lunacy, re Marrow (Cr. and Phil. 143; S. C. 10 Law Journ., N. S., Chanc. 340), and the question there was, whether, the mortgagee having become lunatic, the estate of the lunatic or that of the mortgagor was to pay the costs incident to the reconveyance of the estate, and the Lord Chancellor thought that the mortgagor ought to pay the costs, disapproving of the case of exp. Richards (1 Jac. and Walk. 264). In Townsend's case (2 Phill. 318; S. C. 16 Law Journ., N. S., Ch. 456) the same question came before him, and, still disapproving of exp. Richards, he thought that as that case had been twice followed, the practice was therefore settled, and should not be disturbed. If the case rested there, much might be said as to the distinction between that case and the case now before the court. In exp. Richards it was admitted that, where a mortgagee dies, leaving an infant heir, and an application to the court is

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made, the costs of the conveyance are borne by the mortgagor. That class of cases, therefore, clearly shows that the principle that, wherever costs are occasioned by the necessity of applying for a reconveyance under the act the mortgagee pay the costs, is not of universal application. * * * I come now to a third class of cases, where the mortgagee has devised his estate to trustees instead of allowing it to descend to his infant heir. The mortgagee has a right to do the best he can to protect the property in case of death. Is he to be at the peril of allowing the estate to descend to his heir at law, who may possibly be a person not to be trusted? Or is he not to be allowed for the protection of his own estate to place the mortgage, as well as his other property, in the hands of trustees? Can it be said that if he did such an act he would be deprived of the effect of the general rule which entitles the mortgagee, on having his debt paid off, to be paid also his costs? I think he ought not."

3. *Bankrupt administrator—Assignees—Equitable mortgagee.*—In a creditor's suit against the administrator of an intestate, and against the assignees of the administrator, who afterwards became bankrupt, no costs of the suit were given to either the bankrupt or his assignees: Held, also, that the assignees were not entitled to the costs of a petition which had been served on them by an equitable mortgagee, not a party to the suit, praying payment to him out of court of moneys arising from the sale of the mortgaged estate, which were not sufficient to pay the principal and interest moneys, and to the sale of which he had consented. *Carr v. Henderson*, 18 Law Journ., N. S., Chanc. 39.

4. *Cross-bill—Order for taxation.*—A cross-bill for discovery was filed by the defendant to a bill for relief, and before the answer to the cross-bill was filed the original cause was heard and dismissed, with costs, but no mention was made in the decree of the costs of the cross-bill. The defendant to the cross-bill afterwards put in his answer to the bill, and applied for and obtained, at the Rolls, to which court the original cause was not attached, an order of course for payment of his costs by the plaintiff in the cross-suit, suppressing the fact that the bill was a cross-bill to a bill of relief: Held, that such order was irregularly obtained.

Per M. R.: "In this case there is a bill for relief, and a cross-bill of discovery; and the defendant, having put in a sufficient answer to the bill of discovery, claims to be entitled to his costs of the bill of discovery. By the general orders of the court, the costs of a bill of discovery, filed by a defendant to a bill for relief, are to be costs in the original cause, unless the court otherwise directs. An order of course may be obtained here, or it may be obtained in another branch of the court. It may be obtained

before a judge who can look into the merits, or it may be obtained here, before a judge who has no power to look into the merits. In this case I cannot look into the merits, and I can only decide whether, under the circumstances, the order sought to be discharged was regularly obtained on a petition making no allusion to the original bill of relief; and I am of opinion that it was not regularly obtained. The question, whether or not, on the merits, the costs ought to be costs in the original cause, cannot be determined here. I must discharge the order, but, under the circumstances, without costs."

5. *Lunatic—Mortgage*—1 Will. 4, c. 60.—The expenses of proceedings under the Trustee Act (1 Will. 4, c. 60) for the purpose of obtaining a reconveyance of a mortgaged estate from a lunatic mortgagee, ordered to be borne by the mortgagor, it appearing upon the mortgage deed that the mortgagee was a trustee of the mortgage-money.

The L. C., after referring to the declaration of trust contained in the mortgage deed, and to the order made by Lord Lyndhurst in *ex parte* Clay (Shelf. Lun. 393), said, that the costs occasioned by the lunacy ought neither to fall upon the lunatic's estate nor upon the *cestui que* trust; but that the mortgagor, having express notice that the mortgagee had executed the deed as a trustee, should bear the costs, as well as the other costs of reconveyance.

6. *Purchase of property by parish—Michael Angelo Taylor's Act*—57 Geo. 3, c. 29—*Interim investment of compensation-money*.—Held, that the above-mentioned act not containing any express provisions as to the costs of an interim investment in stock of compensation-money paid into court under the act, the court had not jurisdiction to order the costs of an application for such an interim investment to be borne by the parties who had paid the money into court. *Exp. Crober*, 13 Jur. 381.

The Vice-Chancellor, in substance, repeated his observations in *ex parte* Cooke (7 Jurist, 639), as to later acts of Parliament, of a similar nature with that under consideration, having expressly provided for the costs of the interim investment, and thereby, in his opinion, put a construction upon the earlier acts, which were silent in this particular; and held, that the present act (57 Geo. 3, c. 29) did not confer upon him jurisdiction to order payment of the costs, as prayed by the petition.

7. *Trustees Relief Act*—10 & 11 Vict. c. 96—*Payment out of court*.—Upon the petition for payment out of court of the amount of a particular legacy paid in under this act, the court has no jurisdiction to order payment of any of the costs in the matter out of the testator's general residuary estate. Observations upon the

operation of the act with regard to costs. (*Bartholomew*, *re*, 13 Jur. 380).

Per V. C. of England: "It seems to me that there is an injustice in this act of Parliament, because it treats the fund paid into court in the same manner as if it had been carried over from the testator's general estate to a particular account in a cause. Here I have jurisdiction over nothing except this particular fund. The petitioner served the residuary legatee; he must, therefore, give him his costs—that is a further injustice in the act. This very thing occurred to my mind when I first had occasion to deal with the statute, which then appeared to me to be fraught with manifest injustice, inasmuch as an executor, by paying money into court, might put parties into a worse situation than they would be in if a bill were filed, in which latter case they would get their costs out of the general estate; and I had a conversation with the Lord Chancellor on the subject, and certainly the impression on my mind from that conversation was, that it was the intention of the statute to do this very piece of injustice. It seems to me, that, as the act of Parliament has deprived the court which is administering the jurisdiction of the power to give costs out of the general fund, they must come out of the particular fund. The act ought, I think, to be revised. All parties must have their costs out of the fund in court. Sitting here, I have no jurisdiction to order it otherwise (see *re Sharpe*, 15 Sim. 271; *re Staples*, 12 Jur. 273).

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NOTE.—The Abridgment may be referred to in this short way: 1 Abr. Eq. Cas.

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- P. 7, line 14 from top, for "By sect. 8," read "By sect. 2."
 P. 16, line 18 from top, for "*Form for notice*," read "*Form of notice*."
 P. 48, line 17 from bottom, for "56 B." read "5 Q. B."
 P. 72, last line, add the word "Boats," and the quotation will be complete. Vol. I. Abr. Com. L. Cas. is then complete.

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ABRIDGMENT OF CASES

RELATING TO

COMMON LAW PRACTICE.

TABLE OF ABBREVIATIONS OF REPORTS.

B. C. Bail Court Reports by T. W. Saunders and E. Lawes.
C. B. Common Bench Reports, by Manning, Granger, and Scott.
D. and L. Dowling and Lowndes' Reports.
JUR. The Jurist.
LAW J., or L. J. The Law Journ. (N. S.), new series.
MEESE. AND W., or M. AND W. Meeson and Welsby's Exch. Reports.
Q. B. Queen's Bench Reports, by Adolphus and Ellis.
EXCH. Exchequer Reports.

AFFIDAVIT.

A deponent in an affidavit must state his place of residence, and although it is held that this does not extend to a party to the cause who is sufficiently described as "the above-named plaintiff," or "the above-named defendant," yet it has lately been decided that "H. B., clerk to the above-named defendant," is not a sufficient description of a deponent in an affidavit. *Elton v. Martindale*, 5 Dowl. and Lownd. 248.

See *Brooks v. Farlar*, 5 Dowl. 361; *Stuke v. Blanchard*, *Ibid.* 216.

AMENDMENT.

Costs, payment condition precedent—Amount allowed to be paid.—Where an order for leave to amend is, "upon payment of costs," the payment of those costs is a condition precedent. Therefore, where after a demurrer an order was made that upon payment of costs, the plaintiff should be at liberty to amend his declaration, and the plaintiff did amend and delivered his amended declaration, but did not tender the amount of the costs as ascertained by the Master's allocatur: held, that an interlocutory judgment signed by him for want of a plea was irregular. Where an order for leave to amend is made upon payment of costs, and the costs are taxed and ascertained by the Master's allocatur, the party, in order to avail

himself of the leave to amend, must tender the full amount of the allocatur, and not a less sum, although he may be prepared to show that a mistake has been made in allowing certain items. *Levy v. Drew*, 5 D. and L. 307.

Per Patteson, J. : " I do not see that the plaintiff tendered the proper balance. He chose to tender 4s. less, because, he says, that the Master had made a mistake in his allocatur, by allowing that sum too much to the defendant ; but if he could do this, he might have deducted £10 or any other sum. The allocatur for this purpose must be considered conclusive as to the amount, and if the plaintiff questioned its correctness, he should have made the application in the proper quarter to have it set right ; but he could not tender less than the amount for which it was given, merely because he says that less ought to have been allowed."

ARREST.

1. *Affidavit—Costs of accommodation bill.*—An affidavit to hold to bail under 1 & 2 Vict. c. 110, stated that the defendant was indebted to the plaintiff in £267 16s for the debt, and £69 4s for the costs of an action on a bill of exchange accepted by the plaintiff " at the request of the defendant, conveyed through E. H. B. or his clerk, and for the accommodation of the defendant, &c. : " held good, first, because the acceptor of an accommodation bill may recover against the party for whom he has accepted the bill, both the amount of the bill and all costs incurred by him in consequence of it ; and secondly, that as the affidavit would have been sufficient if it had merely stated that the bill was accepted by the plaintiff at the request of the defendant, without stating the medium through which that request was communicated, no objection could be taken to the words " conveyed through E. H. B. or his clerk." *Stratten v. Matthews*, 12 Jur. 924.

2. *Rescinding order to arrest—Disputing cause of action.*—On an application to the court to rescind a judge's order for arrest under 1 & 2 Vict. c. 110, s. 3, it is competent to the defendant to dispute, upon affidavit, the existence of a cause of action. *Pegler v. Hislop*, 5 D. and L. 223.

Per Parke, B. : " The defendant is not precluded from disputing, upon an application like the present, either the cause of action or any other facts stated in the plaintiff's affidavit. Where the statute of limitations has been a bar to the debt, I have myself relieved parties at chambers. Of course, it must be very clear that the plaintiff has no cause of action for the court to interfere."

ATTORNEY.

1. *Renewal of certificate—Guilty of conspiracy.*—The court refused

to allow an attorney to take out his certificate, where it appeared that he had been found guilty on an indictment for a conspiracy to procure a fiat, and had been sentenced to, and had undergone, eighteen months imprisonment; although the motion was unopposed, and the fact appeared only on his own affidavit, and he swore he was not guilty of the offence, and it had occurred eighteen years ago, since which time he had been engaged as law-clerk in the offices of several attorneys. *Exp. Grey*, 5 D. and L. 275.

Per Erle, J.: "The jurisdiction of this court is exercised not only with a view to maintain honesty and uprightness in the conduct of its officers; but we have also to look at the penal consequences with which offences are visited, in order that persons may not hope, after committing crimes, that they can come here, at however long an interval, and ask to be discharged from the consequences attendant upon their commission. It seems to me that it would be highly inconvenient, if after so great a lapse of time, and after the solemn inquiry then had, the applicant could come here now and question the propriety of that sentence." See *re King*, 8 Q. B. Rep. 129.

2. *Changing—Proceeding in person and afterwards by attorney.*—If an attorney has been employed in a suit, and the client wishes to change him, he must give notice to the other side; but if the party has been proceeding in person, and then appoints an attorney, he may give the other side notice of the fact by the very step which the attorney takes in the case as attorney, without any formal notice. *Jones v. King*, 2 Bail C. 192.

3. *Re-admission without notice—Certificate.*—Where little more than a twelvemonth had elapsed since the admission of an attorney, the court under special circumstances allowed him to take out a certificate without giving the notices required by Rule Easter Term, 9 Vict. *Exp. Weymouth*, 5 Dowl. and L. 60.

See *exp. Webb*, 4 Dowl. and L. 641.

4. *Renewal of certificate—Time of notice not shortened.*—Where an attorney had omitted to take out a certificate for upwards of ten years, and had given the notices required in order to take it out at the end of the term, pursuant to Reg. Gen. Easter Term, 9 Vict.; the court refused, although special grounds were stated for the application, to allow him, on the first day of the term, to take out his certificate forthwith. *Ex parte Barnes*, 5 D. & L. 294.

Per Patteson J.: "I find that in *exp. Weymouth (supra)*, a year and a month had elapsed since the admission of the attorney, who had never taken out a certificate at all. There, therefore, a month only had elapsed since the time within which the attorney might have taken out his certificate without any notice at all. That case scarcely militates against the object of the rule. But

here upwards of ten years have passed without the certificate being renewed, and the very object with which the rule was framed would be defeated were I to grant this application."

5. *Lien on papers*.—An attorney has a lien on the papers in a particular suit, not only for his costs in that suit, but for his general costs; and the court will not interfere with that lien by ordering him to deliver up those papers on payment of the bill of costs in the particular suit, although the bill of costs have been made out and delivered separately; and the client suggests that the possession of the papers is necessary to enable him to carry on the proceedings, and that he will be damnified by delay. *In re Broomhead*, 5 D. & L. 52.

Per Wightman J.: The question really simply is, whether this court will deprive an attorney of his lien over the papers of his client, by substituting some other security in its place. I confess, it seems to me that this cannot be done. It is said that the court will act differently in a case of lien between attorney and client than between ordinary parties. The attorney, it is said, receives the papers in his official capacity; but one of the main incidents to his so receiving them, it must be borne in mind, is, that he may detain them till his costs are paid."

6. *Striking off roll*—*Several counts*.—An application to strike an attorney off the rolls of the court will not be granted upon the mere production of a similar rule obtained in another court, unless there be an affidavit that he is the same person, and the application should not be made on the last day of term. *In re* ——. *gens.*, one, &c. 1 Exch. 453.

7. *Taxable bills*—*One attorney employing another*.—The defendant, a London attorney, employed the plaintiff, also a London attorney, to go to Cambridge and defend a person indicted for bribery at an election there. In 1841 and 1842, the plaintiff delivered to the defendant bills of costs unsigned, and in February, 1847, he re-delivered signed bills. Held, that the bills were taxable under 6 & 7 Vict. c. 73, s. 37. *In re Billing*, 5 D. & L. 126.

Per Alderson, B.: "How does it appear that the bill is for agency business? The charges are upon the usual scale, as between attorney and client." *Per* Pollock, C. B.: "The case of *Weymouth v. Knipe* (3 Bing. N. C. 387; S. C. 5 Dowl. 495), decided that an agent's bill was, by the 12 Geo. 2, c. 13, exempted from the operation of the 2 Geo. 2, c. 23. As, therefore, it required a new statute to take agency bills out of the operation of the 2 Geo. 2, c. 23, and as such bills are *not* excluded from the 6 & 7 Vict. c. 73, the intention of the Legislature evidently was, that the 6 & 7 Vict. c. 73, should have the same effect as the 2 Geo. 2, c. 23, and include agency bills." As to the delivery

of an *unsigned* bill, the court seemed to be of opinion that the proviso in sect. 37 of the act, that no reference to taxation shall be made after the expiration of twelve months after *such* bill shall have been delivered, &c., except under special circumstances, referred only to a *signed* bill. But the case of *re Pender*, in Chancery (2 Phillips, 74), seems *contra*.

COGNOVIT.

Entering judgment after seven years' delay—Leave.—After writ issued, and before appearance entered, the defendant gave a cognovit in the common form. Upwards of seven years afterwards, the plaintiff entered an appearance for the defendant in the action, and signed judgment on the cognovit. Held, that he might properly do so without giving a term's notice, or applying for leave to the court or a judge. A party coming to the court, to rescind an order of a learned judge, and succeeding, will not be allowed to make a subsequent separate application to have the costs repaid, which he has paid under the judge's order. *Thompson v. Langridge*, 5 D. & L. 213.

Per Pollock, C. B.: "A cognovit certainly may be given before appearance, and it contains an implied authority to enter appearance. It admits a cause of action stated upon the record, in the form of a declaration, and though there be not one, it is an admission on the part of the defendant which operates as if there was one. There is, therefore, an authority to enter an appearance. If there had been an appearance and a declaration, and then a cognovit, it seems to be clear that no term's notice would be necessary, and that a party would not be prevented by any lapse of time from entering up judgment on the cognovit. It appears to us that the absence of a declaration in this case cannot be successfully relied upon, because the defendant admits, in fact, that there is a declaration;—that there is a cause of action on the record; and that is an implied authority to the other side to enter an appearance, and to proceed to judgment exactly as if there was a declaration. Neither the rule of court, Hil. Term, 2 Wm. 4, r. 35, nor any statute, nor any analogy arising out of the case cited of *Webb v. Aspinall* (7 Taunt. 701), seems to us to apply."

COSTS.

1. *Costs of the day—Defective record—No similiter—No award of venire.*—A cause was called on at the assizes, and the jury sworn, after which the judge discovered that the record was defective, in not having a *similiter* added to a replication of the plaintiffs, and in there not being an award of *venire*. The plaintiffs prayed that the record should be amended by the judge, but the defendants refusing to consent to the amendment, the judge thought he had no power to make such amendment, and discharged the jury. Held, that the

court had a discretion in granting or withholding costs of the day to the defendants, and that under the circumstances the defendants were not entitled to their costs. *Sleeman v. Copper Miners of England*, 2 Bail. C. 208; S. C. 12 Jur. 184.

Per Erle, J.: "It is quite clear from the authorities, that the court has a discretion in granting or withholding these costs; as the defendants themselves were the means of preventing the cause being tried, by withholding their consent to make the required amendment, the rule for discharging the rule for the costs of the day will be made absolute."

2. *Interlocutory costs taxed after costs in the cause taxed—Two defendants pleading separately.*—Judgment for the defendants on verdict is signed on the 14th Nov., 1846, and on the 9th of March, 1847, the costs in the cause are taxed. It is, nevertheless, competent to the defendants afterwards to tax their costs of a rule for a new trial obtained by the plaintiffs on the 20th of Nov., 1846, and discharged with costs on the 15th of January, 1847; the costs of such rule not being costs in the cause. Two of the defendants pleaded separately, and were represented by different counsel, though by the same attorney. Held, that they were entitled to present for taxation separate bills of costs on the rule. *Newton v. Boodle*, 4 Com. B. Rep. 359.

3. *Reviewing taxation—Writ of error—Small error in taxation.*—The court below will not entertain an application to review the taxation of costs after a transcript of the record has gone to the court of error. The court will not order a taxation to be reviewed, where the amount alleged to be improperly allowed is less than 40s. *Newton v. Boodle*, 4 Com. Bench Rep. 359.

4. *Setting off interlocutory costs.*—It seems that a party may set off interlocutory costs in an action without an order of the court or a judge. *Levy v. Drew*, 5 Dowl. and L. 307.

Per Patteson, Just.: "Now the rule of court (Hilary Term, 2 Will. 4, c. 93) certainly says, that interlocutory costs awarded to the opposite party may be deducted; and as there is no authority to show that it is necessary to come to the court or a judge for an order to be at liberty to deduct them, I should be loth to hold, in the absence of any authority, that such an order was necessary, particularly as it might be productive of great inconvenience."

5. *Witnesses in India—Expenses of commission.*—The Master, in taxing costs of a trial, having allowed a large sum for costs incurred in the execution of a commission for the examination of witnesses in India, without exercising any discretion as to the propriety of the particular charges, the court directed him to review his taxation. *Stewart v. Steele*, 4 C. B. 460.

DETAINDER.

Ca. sa.—*Searching office on discharge—Sunday.*—The defendant, who was in custody at Cambridge, received an order on a Saturday for his discharge; this was forwarded to the under sheriff at Wisbeach. On the next day, Sunday, the gaoler received a warrant of detainer under a writ of *ca. sa.* which had been issued the day before: held, that the sheriff was entitled to detain the defendant for a reasonable time after the receipt of the order, for the purpose of searching his office for writs, and the defendant was not entitled to his discharge under 29 Car. 2, c. 27, s. 6, on the ground that the service of the warrant on Sunday was void. *Samuel v. Buller*, 1 Exch. 439.

EJECTMENT.

4 Geo. 2, c. 28. *Re-entry where no sufficient distress.*—By sect. 8 of 4 Geo. 2, c. 28, in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, if it shall be made appear to the court, where the suit is depending, by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the declaration in ejectment was delivered; and that no sufficient distress was to be found on the demised premises comatervailing the arrears then due, and that the lessor had power to re-enter in every such case, the lessor in ejectment shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made. In an ejectment under the above statute, where the premises are kept locked, and access refused by the parties in possession, so that it cannot be ascertained whether there is a sufficient distress thereon or not, the affidavit stating those facts is sufficiently positive, if it state a *belief* only that there is no sufficient distress on the premises. *Doe Dem. Cox v. Roe*, 5 D. and L. 272.

See *per* Tenterden, C. J. in *Doe Dem. Chippendale v. Dyson*, M. and M. 77.

EXECUTION.

1. *Order for payment of money—Twelve months—Scire facias—Ca. sa.*—Where a rule of court for payment of money is more than a year and a day old, it is not necessary to sue out a *scire facias*, or to obtain the leave of the court, before suing out execution upon it, by virtue of 1 & 2 Vict. c. 110, s. 18. Therefore, where a rule obtained by a defendant had been discharged with costs, and the costs taxed on the Master's allocatur, and more than a year and a day after the allocatur, the plaintiff issued a *ca. sa.* upon it. Held, on motion to set aside the *ca. sa.*, and discharge the defendant out of custody, that the proceedings were regular, and that it was not necessary that the plaintiff should have issued a *scire facias*, or obtained the

leave of the court to issue execution. *Re arbitration between Spooner and Payne*, 5 D. and L. 310.

2. *Ca. sa.*—*Member of Parliament—Privilege*—A member of the House of Commons is privileged from arrest under a *ca. sa.* for forty days before and forty days after each meeting of Parliament. And the privilege is equally applicable to the meeting of a new Parliament after a dissolution, as to the meeting of a Parliament after a prorogation. *Goudy v. Duncombe*, 5 Dowl. and L. 209.

Per Pollock, C. B.: "The question then is, what is the privilege of Parliament with reference to freedom from arrest? In Blackstone's Commentaries, vol. 1, p. 165, it is said, that in case of a commoner, this privilege from arrest extends to forty days after every prorogation, and forty days before the next appointed meeting. In Bac. Abr. tit. 'Privilege,' (C) the authorities are collected. It appears that in an old Irish statute, 3 Edw. 4, c. 1, the privilege is expressly limited to forty days before and forty days after the meeting of Parliament. In the case of the Earl of Athol v. Earl of Derby, cited by Blackstone, and which occurred in the 24 Car. 2 (1672) it is stated, that the commons claimed forty days before and forty days after each session. In Jenkins, 3rd Cent., case 35, p. 118, it is said that the privilege extends to forty days before the Parliament and forty days after."

INQUIRY, WRIT OF.

Teste in vacation.—A writ of inquiry may be tested in vacation, being a proceeding within the meaning of sect. 11 of 2 Will. 4, c. 39, which enacts, that if any writ of summons, &c., issued by authority of that act shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as therein provided, be had thereon without delay. *Collett v. Curling*, 12 Jur. 855.

Per Coleridge, J.: "The only question is, whether a writ of inquiry is necessary in order to proceed to judgment and execution; if so, it may be tested in vacation as well as in term, *Edgell v. Curling* (3 Scott, N. R. 663) [where it was decided that a *subpœna ad testificandum* cannot be tested in vacation] is very distinct from this case: that is not in strictness a proceeding in the cause, which this is. This writ, therefore, is properly tested in vacation."

JUDGE'S ORDER.

Setting aside—Costs—Refunding.—A party coming to the court to rescind an order of a judge, and succeeding, will not be allowed to make a subsequent separate application to have the costs repaid which he has paid under the judge's order; it should have been made a part of the first rule that the costs paid should be refunded. *Thompson v. Langridge*, 5 D. and L. 213.

LIMITATIONS, STATUTE.

1. *Suing out and entering alias and pluries writs*—"Filing"—*Negligence of attorney, liability for*.—Sect. 10 of 2 & 3 Will. 4, c. 39, provides that no first writ shall be available to prevent the operation of the statute limiting the time for commencing the action, unless it and every writ (if any) issued in continuation of a preceding writ shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum specifying the day of the date of the first writ, and [such] return, to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable by the plaintiff or his attorney suing out the same. In a late case, the declaration stated that plaintiff had retained defendant as an attorney to prosecute, and conduct an action in the Court of Queen's Bench for the recovery of a debt, and it became a duty of defendant as such attorney, to use due care and diligence in prosecuting and conducting the action. Breach, that defendant did not use due care and diligence; but, on the contrary thereof, prosecuted and conducted the action in a careless and unskilful manner, in this, to wit, that defendant having sued out certain writs for the purpose of preventing the said action from being barred "did not duly file the said writs with the proper officer of the said court, according to the necessary and accustomed practice of the said court:" held, in the Exchequer Chamber after verdict, and after judgment for plaintiff in the Court of Queen's Bench, that the word 'filing' might be understood of bringing the writ into the office for the purpose of its being entered on the record; and that the duty of defendant was properly laid, and the breach of that duty properly assigned in the declaration. *Hunter v. Caldwell*, 12 Jur. 285, affirming judgment of Queen's Bench, reported 16 Law Journ., N. S., Q. B. 274; S. C. 11 Jur. 770.

Per Parke, B.: "The instance of want of due care and diligence appears to be perfectly well assigned. It was the duty of the defendant to do everything proper in conducting the suit, and to cause the statutory forms to be observed, and, therefore, to cause the writs to be filed and entered of record. We must presume after verdict that filing the writs was a step necessary to be taken for that purpose. The reason given by the Court of Queen's Bench is quite satisfactory: 'if there be any sense of the word *filing*, according to which, by the practice of the court, it is his duty to file the writ, after verdict that will be sufficient; and we have already said that we think filing may reasonably be understood of bringing the writ into the office for the purpose of its

being entered on the record, and that it is the duty of the attorney to bring it in.' "

2. *Form of plea—Covenant.*—The uniformity of Process Act, 2 Will. 4, c. 39, having put all actions on the same footing, and made the issuing of the writ of summons the commencement of the suit, the plea of the statute of limitations ought to be in the same form; and if the plaintiff replies that the cause of action did accrue within the limited time, he must show by a proper record all the formalities required by the 10th section to have been complied with, just as he must have done before the statute where there was a plea that the cause of action did not accrue within six years, &c., before the commencement of the suit. In an action of covenant on an indenture, a plea under the 3 & 4 Will. 4, c. 42, s. 3, pleaded in bar of the further maintenance of the action, that the cause of action accrued more than twenty years before the pluries summons with which the defendant was served, and that that writ could not, according to 2 Will. 4, c. 39, s. 10, be connected with any anterior process, and must, therefore, be considered as the commencement of the suit: held bad on special demurrer. First, as being only an argumentative allegation that the cause of action accrued twenty years before the commencement of the suit; and secondly, that it ought not to have been pleaded in bar of the further maintenance of the action. *Higgs v. Mortimer*, 12 Jur. 249.

Per Pollock, C. B.: "The question in this case arises as to the proper mode of pleading the statute of limitations, since the stat. 2 Will. 4, c. 39, s. 10, requiring a particular mode of issuing and continuing writs in order to prevent the operation of any statute of limitations. In the old mode of proceeding, if the plaintiff sued by bill he might elect to treat the filing of the bill, or the previous process by *latitat*, as the commencement of the suit, and if the defendant pleaded that the cause of action accrued more than six years before the filing of the bill, the plaintiff must have replied the *latitat* returned, with continuance to connect it with the bill (*Beardmore v. Rattenbury*, 5 B. and A. 452; 2 Wms. Saund. 2a. n. (i), 63g, n. (o)). If the defendant had pleaded that the cause of action did not accrue within six years before the commencement of the suit, such a replication was neither necessary nor proper, and in proceedings in the Common Pleas, or by original writ, the plea always was in the latter form, and the replication alleged that the cause of action accrued within six years before the commencement of the suit—and the plaintiff must then, as a matter of evidence, have shown the issuing and return of the writs and proper continuances by a copy of the record. As the uniformity of Process Act puts all actions on the same footing, and makes the issuing of the writ of summons the commencement

of the suit, the plea of the statute of limitations ought to be in the same form; and if the plaintiff replies that the cause did accrue within the limited time, he must show by a proper record all the formalities required by the 10th section to have been complied with just as he must have done before, where there was a plea that the cause of action did not accrue within six years, &c., before the commencement of the suit."

MISNOMER.

3 & 4 Will. 4, c. 42, s. 11—*Amendment—Demurrer—Initials of defendant.*—Formerly a misnomer in the declaration of either the plaintiff or defendant was pleadable in abatement (Com. Dig. tit. "Abatement," E. 18, F. 27; Prac. Com. Law, 322). But by 3 & 4 Will. 4, c. 42, s. 11, no such plea is now allowed, but defendant may have the declaration amended, by inserting the right name. It has lately been decided that the describing the defendant in a declaration by his surname, and the initials only of his Christian name, is not a misnomer amendable under the 3 & 4 Will. 4, c. 42, s. 11, but it is an insufficient designation of the defendant, of which advantage must be taken by demurrer. *Miller v. Hay*, 12 Jur. 985.

Per Parke, B.: "Counsel in support of the declaration argued, that the proper mode of taking the objection was by application to the court by the defendant, to oblige the plaintiff to amend, under the 11th section of 3 & 4 Will. 4, c. 42, which substitutes such an application for a plea of misnomer: and he pointed out, that in the cases on this subject in which it has been held that the use of the initials, or other description than that of his Christian and surname, was bad on special demurrer (*Esdaile v. Maclean*, 15 Mees. and W. 277; *Levy v. Webb*, 17 Law Journ., N. S., Q. B. 407; *Gatty v. Field*, *Id.* 408), the names were those of other persons, not those of parties to the suit; and he cited the case of *Rust v. Kennedy* (4 Mees. and W. 586; 3 Jur. 198), to show that if the defendant was so described, the proper course was to apply under the stat. 3 & 4 Will. 4, c. 42, to amend as for a misnomer. On the other hand it was contended by the counsel for the defendant that this was a defective statement, not a misnomer, and that the Court of Common Pleas had intimated, in refusing to set aside a demurrer for this cause as frivolous, that the cause was well assigned in *Nash v. Collier* (17 Law Journ., N. S., C. P. 91). We think that this view of the case is a right one. The defect is not a wrong, but an insufficient, designation of the defendant, and bad on the face of the declaration. Before the act for the amendment of the law, the defendant could not have pleaded a misnomer in abatement if so described, in most if not all the cases, as he could not have truly stated that he was not known by that name, and yet it was a defect of which advan-

tage could be taken in *some* form; and being on the face of the declaration, a demurrer is the proper form."

NONSUIT, JUDGMENT.

Form of affidavit.—On a motion for judgment as in case of a non-suit, the affidavit stated "that no notice of trial had been given in this cause," without negating that a trial had in point of fact been had: held, sufficient. *Woolmer v. Collins*, 5 Dowl. and Lownd. 306.

NUL TIEL RECORD.

Trial—Issue roll.—It is necessary, in order to try the issue joined on a plea of nul tiel record, that the issue roll should be made up and carried in notwithstanding the Gen. Rule of Hil. Term, 4 Will. 4, pt. ii, r. 15, which says that the entry of proceedings on the record for trial, or on the judgment-roll (according to the nature of the case) shall be taken to be, and shall be in fact, the *first* entry of proceedings in the cause, or of any part thereof, upon record. *Jackson v. Oates*, 5 Dowl. and Lownd. 231.

OUTLAWRY.

Reversal by writ of error—Appearance—Attorney's authority.—The defendant was outlawed for not entering an appearance, where upon a writ of error *coram nobis* was allowed to reverse the outlawry. On application to set aside the writ of error: held, that it is not necessary that the attorney for the plaintiff in error should show by affidavit that he has the authority of the outlaw to issue such writ, nor that the outlaw has entered an appearance to the original action. *Cornewall v. Ives*, 2 Bail Cot. Cas. 195; S. C. 12 Jur. 1003.

Per Erle, J.: "The officers of the court inform me that it is not the practice for an outlaw suing out a writ of error to reverse an outlawry to enter an appearance in the original action and I see by reference to Tidd's Forms (8th edit. p. 58, s. 36), that it is not until after the reversal of the outlawry that the defendant's appearance is entered."

PLEAS.

Rule to plead several matters—Setting aside pleas—Re-pleading without new rule—Coverture, plea of.—The defendant after appearing by attorney, obtained an order to plead together her coverture in bar and the statute of limitations. She pleaded those pleas accordingly. They were afterwards set aside by a judge at chambers, on the ground that they ought not to have been pleaded together, as coverture ought not to be pleaded after appearance by attorney. The defendant then, without any fresh appearance or order to plead several matters, delivered pleas of coverture to the two first counts, and the statute of limitations to the whole declaration. The plaintiff thereupon signed judgment for want of a plea. That judg-

ment having been set aside by judge's order with costs, it was held upon application to rescind that order, that the judgment was improperly signed, as the order to plead several matters did not bind the defendant to plead each plea to the whole declaration, and the order setting aside the former pleas did not make a new rule to plead several matters necessary. *Fryer v. Andrews*, 5 Dowl. and Lownd. 221.

PRISONER.

Charging in execution—Irregularity no objection.—It is no cause to show against a motion to charge a defendant in execution, who has been brought up on a writ of *habeas corpus ad satisfaciendum*, that the warrant of attorney on which the judgment has been signed was given without consideration, and the judgment signed in breach of good faith. Such facts are the proper grounds of a substantive motion to set aside the warrant of attorney, and judgment and subsequent proceedings, and to discharge the defendant out of custody. The court will, therefore, not postpone the motion to charge the defendant in execution, until the other rule comes on to be discussed. *Cooke v. Wright*, 5 Dowl. and Lownd. 274.

SCIRE FACIAS.

1. *Public Company — Notice to shareholder of judgment.* — By 7 & 8 Vict. c. 110, s. 68, it is enacted that no motion shall be made nor summons granted for the purpose of charging any shareholder or former shareholder, until ten days' notice thereof shall have been given to the person sought to be charged thereby. In a case where the plaintiff, who had obtained a judgment against a company, gave notice to a former shareholder of his intention to make a motion to the court, or an application to one of the judges thereof, for a rule or summons, calling upon him to show cause why execution should not issue against him, and accordingly obtained a summons, which was dismissed by the judge at chambers: Held, that the notice was thereby exhausted, and that the plaintiff was not entitled under it to make a subsequent motion to the court. *Corden v. Universal Gas Company*. 12 Jur. 630.

Per Wilde, C. J. : "I think the last point is decisive against this application. It was thought fit by the legislature that any shareholder sought to be charged upon a judgment obtained against the company, should have ten days notice of the application for a rule or summons calling upon him to show cause why execution should not issue against him; and it was left in the option of the plaintiff to make the application either to the court or to a judge at chambers. The plaintiff gives a notice of his intention to do one of two things, and the party receiving it would reasonably expect, if one of the two were done, namely, if an application were made to a judge at chambers, that the notice

would be satisfied. He accordingly goes before a judge at chambers, and the summons is dismissed, for what cause does not appear, as the plaintiff's affidavits do not mention the fact of the application having been made at chambers at all. This is not, therefore, by way of appeal from the decision of the judge at chambers, but must be taken to be an original application to the court; and I think that the plaintiff failed to comply with the act, which requires him first to give ten days' notice, inasmuch as the original notice, which has been acted upon in the manner I have before stated, was exhausted, and no fresh notice has been given."

2. *Public company*—"Shareholders for the time being"—*Renewing application*—*Costs of previous application*.—Affidavits stated, that from returns, filed by a company in the registration office, it appeared that D. C. had signed a consent to act as one of the provisional committee; that he was a party to the deed of settlement, which appointed him a director, and contained a recital that the parties thereto had taken shares, and a stipulation that each director should hold fifty; that no transfer of shares by D. C. had been registered in the office on November 6th, five days before the rule was moved: held, that it sufficiently appeared that D. C. was a shareholder for the time being, and liable as such, under 7 & 8 Vict. c. 110, s. 66, to execution upon a judgment obtained by the plaintiff against the company. A rule, calling upon the same D. C. to show cause why execution upon the same judgment should not issue against him as a former shareholder in the company, was, in a previous term, discharged with costs, on the ground that a notice given under the 68th section had been exhausted; the costs of that rule had not been paid, but a fresh notice had been given, charging D. C. as a shareholder for the time being. Held, that the plaintiff was entitled to issue execution against D. C. as a shareholder for the time being. (*Corden v. Universal Gas Company*, 13 Jur. 11).

Per Coltman, Just.: "As to the first question, whether the court should postpone the hearing of the present application until the costs of the previous one have been paid, we think, that as the defendant Causse has got an order in his favour for those costs, and it does not appear that he cannot enforce it, no sufficient grounds have been shown for staying proceedings till the costs are paid. As to whether Causse is, or is not a shareholder there can be no contest. By the 3d section of 7 & 8 Vict. c. 110, the word "shareholder" means, "any person entitled to a share in the company, and who has executed a deed of settlement." The deed in this case, which Causse has executed, recites that he had taken shares; and by the 13th section, his liability as a shareholder continues until he has made a return of a transfer of

his shares pursuant to the provisions of the act. This he has not done; therefore he seems to be a shareholder for the time being, and properly subject to this execution. But the objection to the rule is, that a former application has unsuccessfully been made to the court, which was substantially the same as the present. No doubt, had that application been heard on the question, whether or no he was a shareholder of the company, the court would not now entertain the question again; but, in the former case, the original notice required by the act was considered to have been exhausted, and the plaintiff was in the same position as if no notice at all had been given, and on that ground the court discharged his rule. In the present instance, he stands in a different position; he has given a new notice; and, without doing violence to the established cases, I think we may reasonably hold that he is entitled to be heard on his present application, and that this rule must be made absolute."

3. *Public Company — Shareholders at time of contracts—Subsequent shareholders — Collusive transfers, &c.* — In an action of debt against the public officer of a joint-stock company, judgment was signed for the nominal debt in the declaration; the court granted leave to issue a *sci. fa.* upon the judgment under stat. 7 Geo. 4, c. 16, against a member of the company at the time when the contracts upon which judgment was obtained were entered into, plaintiff undertaking not to levy more than was due. The court also granted leave to issue a *sci. fa.* against a member of the company at the time when some only of the contracts upon which judgment was obtained were entered into; execution to be limited to the contracts for which he was liable. Affidavits on which the court was asked to grant leave to issue a *sci. fa.* against B., showed that proceedings had been taken against ten of the present members of the company, and execution issued which had been unproductive; that the other present members had no property which could be made available; and that B.'s name appeared as a member of the company in the return made in March, 1845. The affidavit of B. stated, that he was not a member of the company at the time when the contracts upon which judgment was obtained were entered into; and affidavits on his behalf stated, that the shares of G., who was a member of the company at the time when it stopped payment, had been transferred without consideration, and in collusion with certain officers of the company, and that P., one of the present members of the company, was actuary of a certain Assurance and Loan Association, and as such, held three shares of the company, and was entitled to be indemnified against any liability which he might incur by being trustee: held, first, that it was not necessary that proceedings should have been taken and execution issued against existing members,

where the probability was that such executions would be ineffectual. Secondly, that B. being shown to be a member in March, 1845, it was incumbent upon him to state when and by what act he ceased to be so. Thirdly, that a collusive transfer of the shares of G. was no answer, plaintiff not being shown to be a party to such transfer. Sixthly, that it was not necessary that proceedings should have been taken against P. *Harvey, Public Officer, &c. v. Scott, Public Officer, &c.*, 12 Jur. 12.

SUMMONS, WRIT OF.

Misdescription of defendant—Pluries for alias.—A writ described a defendant as "the Right Honourable Baron Suffield," his true description being "the Right Honourable Henry Vernon Harbord Baron Suffield;" the court refused to set aside the process on that ground. A precepe being made out for an alias writ a pluries was by mistake issued: Held to be no ground for setting aside the pluries (*Wells v. Lord Suffield*, 5 D. and L. 177).

TRIAL, NOTICE OF.

Form for notice—Time of giving.—There is no particular form requisite for a notice of trial, so that it unequivocally conveys to the party to whom given the intention of the plaintiff to try at a particular time and place. Where a notice stated incorrectly that the cause was made a remanet from the last sittings in a previous term, but correct in other respects: held, a good notice. A notice of trial may be given after a cause is set down for trial. *Ginger v. Pycroft*, 12 Jur. 898.

Per Coleridge, J.: "The case of *Fyte v. Stevenson*, 2 W. Black. Rep. 1298, is an authority to show that the form of a notice of trial is immaterial if it prove unequivocally that it is the intention of the plaintiff to go to trial at a certain specified time. The notice there, although it purported to be the continuance of a former notice, was held good as an original notice. But it was said that a cause could not be set down for trial until a proper notice had been given. No authority, however, was adduced in support of this proposition. The cases of *Jacks v. Mayor*, (8 Term Rep. 245), and *Ellis v. Trusler* (2 W. Black. Rep. 798), cited, I think are not in point, nor does it anywhere appear to have been laid down that such is necessary. In practice no doubt the greater number of notices of trial are given before entering the same for trial, because it is usually indorsed on the issue; but this is by no means necessary."

TRIAL, WRIT OF.

Setting aside verdict by judge—Irregularity—Nullity—Waiver.—The 3 and 4 Will. 4, c. 42, gives power to a judge to stay execution on a writ of trial, so as to enable the party to move for a new trial, but does not enable the judge to grant a new trial. A

judge at chambers having made an order to set aside a verdict for the plaintiff on a writ of trial, on the ground of an insufficient notice of trial, it was held that the judge's order was an irregularity only, and not a nullity; and, therefore, might be waived. *Orgill v. Bell*, 5 Dowl. and L. 217.

Per Alderson, B.: "I have no doubt that this order was an irregularity which would have been set aside if the application had been made in proper time. It is not, however, a nullity. There must be some end to litigation, and the usual rule in cases of irregularity, that the complaining party must come in reasonable time, must prevail in the present case."

WARRANT OF ATTORNEY.

Old—Affidavit of being alive—Agreement to waive such affidavit.—On a motion to enter up judgment on an old warrant of attorney, an affidavit that the deponent has seen the defendant alive within three months, and that he is now residing at Paris, is insufficient; unless it also state that his residence there is unknown. A party may, by the terms of the warrant of attorney, waive the necessity of an affidavit being made, of his having been recently seen alive, in order to obtain leave to enter up judgment after a year and a day have elapsed. *Tripp v. Stanley*, 5 Dowl. and Lownd. 262.

2. *Attestation—Adoption of attorney—Form of attestation.*—The attestation to a warrant of attorney, under sect. 9 of the 1 & 2 Vict. c. 110, was in the following form: "Signed, sealed, and delivered by the said H. H. (the defendant) in my presence; and I declare myself to be attorney for the said H. H.; and that I subscribe my name as such attorney. (Signed) G. O., solicitor." It was held that this was a sufficient compliance with the terms of the statute. It was also held that it need not appear on the face of the attestation, in express words, that the attorney attesting the defendant's signature attended at the defendant's request, and that he was named by him. *Semble*, that the adoption of a person by the defendant as his attorney would suffice, although not nominated by him. *Gray v. Hall*, 13 Jur. 124.

Per Patteson, J.: "It does not appear on the face of the attestation that the attorney was expressly named by, and attended on behalf of, the defendant. It was contended that it ought to have done so. There were no cases, however, cited during the argument, nor do I find any, in which it has been held that it must appear on the attestation; although the cases decided, where the question of the insufficiency of the attestation has arisen, seem to have had these words inserted. Upon looking at the act of Parliament, it does not appear that these words must be inserted. * * I am slow to believe the assertion of defendants, that no attorney was named on their behalf. It is a matter so well known in the

profession, I am always disposed to think, that where an attorney is applied to, he does his duty."

3. *Setting aside for want of consideration*.—Where certain goods were vested in trustees for benefit of infant children, the trustees refusing to act, upon which the grandmother, with whom the infant children were living, took part away, and suffered a portion to remain in the possession of the stepfather on his giving a warrant of attorney, the court refused to set aside the warrant of attorney on the ground of want of consideration. *Quere*, whether the court will set aside a warrant of attorney, even where there appears to have been no consideration. *Gray v. Hall*, 13 Jur. 124.

Per Patteson, Just. : "There are several cases of fraud, illegality of consideration, &c., in which the court have set them aside: one case, I find, where a man executed a warrant of attorney to a friend, to whom he was not indebted, to protect his property; and a question arose whether it could be avoided, on the ground of want of consideration. That was not an application by himself, however, but on behalf of his creditors. If this had been simply a question whether or not there had been any consideration, I should have had great difficulty in saying that, upon that ground, the defendant would be entitled to have the judgment set aside. There certainly was some colour for giving the warrant of attorney, although, perhaps, not sufficient to maintain an action. The defendant was in possession of the furniture, and the plaintiff suffered him to retain a portion on his executing the security in question."

See *Harrod v. Benton*, 8 Barn. and Cress. 217; *Webb v. Taylor*, 1 Dowl. and L. 676; *Pract. Com. L.* 355.

WITNESS.

1. *Interested—Indemnity*—6 & 7 Vict. c. 85—"Immediate or individual behalf, &c."—In an action for money had and received to the use of the plaintiff, a witness called on the part of the defendant said on the *voir dire*, "I indemnified the defendant; the defendant said at first he would defend the action; I said I will share the loss: held, that he was a competent witness under the 6 & 7 Vict. c. 85, and perhaps even independently of that statute. *Seem*, that the test whether a witness is "a person in whose immediate and individual behalf an action is brought or defended either wholly or in part," is, would his declarations be receivable against the party on whose behalf he is called to give evidence. *Concessum*, that the onus lies on the party objecting to the testimony of a witness on the ground of interest since 6 & 7 Vict. c. 85, s. 1, to show that the case falls within the proviso in that section. *Sage v. Robinson*, 12 Jur. 1054.

2. *Non-attendance on subpoena—Action against witness—No cause of action, but several issues*.—In order to maintain an action against

a witness for not attending to give evidence in obedience to a subpoena, the plaintiff must show that he has, in consequence of his absence, sustained some damage; but where there are several issues for trial, the circumstance that the plaintiff had no good cause of action does not necessarily exclude the plaintiff from having sustained such damage, as he may have sustained it in respect of the costs of some of the issues on which he might have succeeded by the testimony of such witness. *Couling v. Case*, 13 Jur. 101.

Per Wilde, C. J. : " With respect to the validity of the plea, it is to be observed that the declaration is for the injury sustained by the plaintiff in consequence of the breach of duty by the defendant in not obeying the subpoena, and by means of which breach of duty the declaration alleges the plaintiff was delayed in recovering his damages against Foulkes, and also was obliged to pay him certain costs, and also that certain costs incurred by the plaintiff in proceeding to trial became useless; and the question is, whether the want of a good cause of action against Foulkes shows that the plaintiff is not entitled to recover for any part of this matter of complaint, for, unless it has that effect, the plea, being pleaded to the whole cause of action, is bad. By the statute of Anne, which enabled the defendant to plead several matters, or since that statute, when only one issue has been joined, a plaintiff who had no cause of action could not, under ordinary circumstances, sustain any damage from the absence of a witness; and this is the reason why, in several of the cases which have been determined on the subject of the action for disobeying subpoenas (when it did not appear that more than one issue was joined), the court have considered that an allegation of a good cause of action, either in express terms or in terms which were held to imply it after verdict, was necessary to sustain the judgment for the plaintiff, because, in the absence of such an allegation, the declaration did not show the plaintiff had sustained any particular loss or damage by the non-attendance of the defendant. In an action such as this is, for a breach of duty, not arising out of contract between the plaintiff and the defendant, but for disobeying the order of a competent authority, the existence of actual damage or loss is essential to the action, as the law will not imply a loss to the plaintiff from mere disobedience to the subpoena. But when, since the statute of Anne, there are several issues, it may be that the plaintiff has no cause of action, but yet he may have sustained damage in respect of costs of some of the issues on which, although failing in his suit generally, he might have succeeded by the testimony of the witness, if he had attended in obedience to his subpoena. It is clear that the terms of this declaration comprehend such damage, and that the allegation that the defendant was a material witness on the

issues is, after verdict, a sufficient allegation that the plaintiff would have succeeded on some of them if the witness had given his evidence; and, consequently, that he may have sustained pecuniary loss from the absence of the defendant, although he had no cause of action against Foulkes."

3. *Legatee*.—In ejectment by the devisee under the former will against the devisee under a subsequent will, a legatee under a former will is a competent witness for the lessor of the plaintiff, by statute 6 & 7 Vict. c. 85. *Doe dem. Vingoe v. Nicholls*, 13 Jur. 123.

Mr. Just. Patteson observed that in *Sage v. Robinson* (12 Jur. 1054) it was held that a person who had agreed to share with the defendant the costs of the defence was a competent witness under the statute, and finally said, "It is impossible to say that the witness had an immediate benefit, though the action is for his mediate benefit."

ABATEMENT.

Affidavit of verification—Defect in waived—Irregularity.—The 4 Anne, c. 16, s. 11, requiring pleas in abatement to be verified by affidavit is an enactment for the sole benefit of plaintiffs, and may be waived by them. Therefore, where a defendant delivered a plea in abatement, with a defective affidavit of verification, and the plaintiff traversed the plea and made up the issue, and the defendant struck out the similiter and demurred, and the plaintiff, after an unsuccessful application to set aside the demurrer as frivolous, obtained two several summonses for time to join in demurrer, and before the time expired signed judgment as for want of a plea, it was held that the judgment was irregular. *Graham v. Ingleby*, 1 Exch. Rep. 651.

Per Parke, B.: "The question is, what is the meaning of the statute of Anne, which requires an affidavit of verification as a condition precedent to a valid plea in abatement? If that enactment be intended for the sole benefit of plaintiffs, then the maxim applies *Quilibet potest renunciare juri pro se introducto*. It is evident that the requirements of that statute were solely for the benefit of plaintiffs, and in order to prevent them from being delayed in their suits; and that they have no reference whatever to other suitors, or the rest of the Queen's subjects. It follows that though an affidavit is so defective as to amount to no affidavit, a plaintiff may, if he choose, waive the benefit of his right, and join issue on the plea, and go to trial: and if he does so, he cannot afterwards avail himself of the provisions of the statute. So, if he

should demur to the plea, he would, in like manner, waive the benefit of the statute. * * This case is distinguishable from *Goodwin, g. t., v. Parry* (4 Term Rep. 577), because that case was decided on the ground that the enactment was for the general benefit of the public. Whether rightly or wrongly decided we need not now stop to inquire. * * I cannot agree with the latter part of the judgment of Taunton, J., in *Garratt v. Hooper* (1 Dowl. 28), where he says that the court is bound to treat as a nullity a plea in abatement not verified by affidavit, though the plaintiff is willing to accept it."

AFFIDAVIT.

1. *Jurat—Description of judge.*—"Sworn in court the 5th day of November, 1846, before E. V. Williams" (the judge's signature), is a sufficient jurat. *Thorne v. Jackson*, 3 Com. B. Rep. 661.

2. *Jurat—Commissioner's description.*—An affidavit with a jurat signed "A. B., a commissioner," &c., is sufficient. *Munden v. Brunswick*, 4 Com. B. Rep. 321; S. C. 4 Dowl. and L. 807.

3. *Jurat—Defect in—Several deponents—Costs.*—Where a rule has been obtained on an affidavit, the jurat of which is defective in not containing the names of the respective deponents, sworn pursuant to the rules of the court, Mich. 37 Geo. 3, and Trin. 1 Geo. 4, the court will discharge the rule with costs. *Cobbett v. Oldfield*, 16 M. and W. 469; S. C. 4 Dowl. and L. 492; 16 Law Journ., N. S., Exch. 150.

Per Alderson, B.: "We are bound by the case of *Blackwell v. Allen* (7 Mees. and W. 146) to discharge this rule with costs.

See *Frost v. Hayward*, 10 Mees. and W. 673.

4. *Jurat—"Before me."*—An affidavit sworn before a commissioner omitting in the jurat the words "before me," is bad. *Graham v. Ingleby*, 1 Exch. Rep. 651.

Per Parke, B.: "We are bound by the cases of *Reg. v. Bloxam* (6 Q. B. Rep. 528), and *Reg. v. Norbury* (6 Q. B. Rep. 534, note) to hold that this affidavit, having been made before a commissioner, is bad for omitting in the jurat the words "before me."

The case of *Empey v. King* (13 Mees. and W. 519) in this court is distinguishable, for there the affidavit was sworn before a judge at chambers. The present affidavit is equivalent to no affidavit."

5. *Using in second application.*—Where a rule obtained in the name of the plaintiff to set aside an order had been discharged on an affidavit of the plaintiff, that the application was made without his authority or consent, the court allowed a second application to be made on the same affidavits in the name of the party on whose behalf the law was brought. *Tilt v. Dixon*, 4 Com. B. Rep. 736; S. C. 17 Law Journ., N. S., C. P. 61.

See "MOTION, RENEWING."

AMENDMENT.

Record — Error in award of jury process.—Where a cause had been made a remanet, but there was no respite of the award authorising the issue of the jury process, held that the court would order the error to be amended before the ensuing term, and proceed at once with the trial. *Ward v. Dalton*, 2 Car. and Kirw. 659.

Per Wilde, C. J.: "In Tidd's Practice it was laid down that where a cause stood over from one sittings to another, the record should be regularly resealed, which meant not merely that it should be taken to the seal office and literally resealed, for that was never done, but that all necessary alterations in the body of the record should be made; and this was precisely applicable to the present case. The objection is by no means a light one; but as it is one which ought not, if possible, to prevail now, I shall direct that the plaintiff shall make the roll right before next term."

APPEARANCE.

Where real defendant not served—Intitling affidavit — Serving judge's order—Attorney ordered to pay costs of irregularity.—A writ issued in an action intended to be brought against one John G., by mistake described him as Henry G., and was served upon Henry G.; the mistake in the service being discovered, notice was given to Henry G. not to appear. A copy of a pluries summons was some months afterwards left at the residence of John G., the real defendant, still describing him as Henry G. The defendant gave this copy to Henry G., in whose name one Lewis, an attorney, entered an appearance, demanded a declaration, and afterwards (with full knowledge that the appearance was no appearance in the cause) signed judgment of non-pros for want of a declaration. The court set aside the judgment for irregularity, with costs to be paid by the attorney. Upon the motion to set aside the appearance, the affidavit was intituled in the matter of the attorney in a cause between "A. B. and C. D., plaintiffs, and John G., sued by the name of Henry G., defendant." Held, that it was properly intituled. A party who obtains a judge's order can derive no benefit from it unless it be duly served upon his opponent. *Belcher v. Goodered*, 4 Com. B. Rep. 472.

ATTORNEY.

Striking off roll.—Misdemeanor—Rule nisi.—A rule to strike an attorney off the roll of the Court of Exchequer, on affidavit that he has been convicted in the Queen's Bench of a misdemeanor, and struck off the roll of the court, is a rule nisi, which makes itself absolute unless cause be shown within the time prescribed. *Re Wright*, 1 Ex. Rep. 568.

Per Curiam: "In a serious matter of this nature, the party sought to be affected ought to have an opportunity of denying his identity with the person convicted in the Court of Queen's Bench."

CHARGING ORDER.

Stock—Execution.—A testator directed his executors to set apart so much of his Old Three-and-a-Half per Cent. stock as should produce £8,000, and pay the interest thereof to his wife during her lifetime, and then divide it between his four children, of whom the defendant was one. Upon an affidavit that the executors had sold out all testator's stock, except a sum of £8,000, and had left that sum still standing in the testator's name for the above purposes, and had applied the interest thereof as by his will directed, the court granted an order, under the 23rd section of the statute 3 & 4 Vict. c. 106 [for Ireland], charging one-fourth of the stock in execution. *Erington v. Prior*, 10 Ir. Law Rep. 79.

COSTS.

1. *Order for security for, stays proceedings—Judgment—Sustaining order, effect of.*—The defendant obtained an order requiring the plaintiff to give security for costs, and staying proceedings until such security be given. Subsequently the defendant arrested the plaintiff on a cross demand, under the 1 & 2 Vict. c. 110, s. 3, whereupon the plaintiff went to gaol, and then took out a summons, upon which an order was made, ordering that the first order restraining proceedings until security for costs should be given should be suspended as long as the plaintiff remained in actual custody in the cross action, and giving the defendant ten days' time to plead. Shortly after this, and before the expiration of the time to plead, the defendant let the plaintiff out of custody, and, the defendant not having pleaded, signed judgment for want of a plea. The plaintiff had not given security for costs. Held, that the judgment was irregular, for that as soon as the plaintiff was released from custody the first order revived, and that, therefore, before the defendant could have been required to have pleaded, security for costs should have been given. *Todd v. Johnson*, 2 Bail C. 203.

Per Wightman, J.: "The order which I made restraining the operation of the order for security for costs was intended to operate only so long as the plaintiff should remain in actual custody, and I made it upon a consideration of the hardship of its operation whilst the plaintiff was actually in custody at the defendant's suit; but as soon as the plaintiff became released it was intended of course that it should revive; and before, therefore, the plaintiff could call upon the defendant to plead, he ought to have complied with the first order and have given security."

2. *Not proceeding to trial—Costs of the day—Pauper—Staying proceedings till payment of costs.*—Where a pauper made default in proceeding to trial, in pursuance of notice, and was resident without the jurisdiction of the court, it was held that in an application for the costs of the day for not proceeding to trial, the defendant was

entitled to make the payment of the costs a condition precedent to further proceedings. *Cross v. Port of London Assurance Company*, 13 Jur. 125.

Per Patteson, Just. : "I think the fact that the defendants have no remedy open to them to recover the amount of these costs takes the case out of the ordinary course usually pursued in these cases."

See *per Parke, B.*, in *Airne v. Chinnock*, 8 Dowl. 736.

DECLARATION.

1. *Striking out counts founded on the same subject-matter—Appealing from judge—Costs.*—The plaintiff contracted to purchase from A. a ship then in course of building at Quebec, and accept a bill for the price on the vessel being completed according to the terms of the contract, and registered in his name. On the bill being presented for acceptance, the plaintiff declined to accept it, on the ground that A. had not duly performed his contract; whereupon the defendant undertook that, if the plaintiff would accept the bill, he (the defendant) would abide by and perform the award of certain referees to be appointed to determine what should be done, in case, on the arrival of the ship at Dublin, the plaintiff should have any cause of complaint against A. in respect of his performance of the contract. On the ship's arrival, the referees awarded that a certain sum was payable to the plaintiff, on account of deficiencies in the ship. The court refused to allow the plaintiff, in declaring against the defendant on his guarantee, to add to a count for non-performance of the award, a count alleging that in consideration of the plaintiff's accepting the bill, the defendant agreed to become personally responsible for the due performance of the contract by A., holding a joinder of such counts to be in apparent violation of the fifth rule of Hilary Term, 4 Will. 4. *Fagan v. Harrison*, 4 Com. B. Rep. 909.

Per Wilde, C. J. : "We are all of opinion that the order of the judge in this case [which was that the second count should be struck out with costs, on the ground that the two counts were founded upon the same identical subject-matter of complaint] was perfectly correct, and therefore that the rule should be discharged; and, being an appeal against a decision at chambers, it must be discharged with costs."

2. *Striking out counts—Appeal to court where judge declines to make an order.*—Where a judge at chambers has declined to make an order upon an application under the 5th and 6th rules of Hilary Term, 4 Will. 4, to strike out counts as being in apparent violation of the former rule, it is competent for the court to entertain the matter. A count for goods sold and delivered was not allowed together with a count upon a special contract, apparently for the price of the same goods, unless the plaintiff could satisfy a judge at chambers that he *bond fide* intended to establish a distinct subject-

matter of complaint in respect of each count. *Dissentiente* Cresswell, Just., as to the application of the rule to the particular case. *Grissell v. James*, 4 Com. B. Rep. 768.

Per Coltman, J.: "It seems to me that in order to entitle a party to apply to a judge to strike out counts as being an apparent violation of the fifth rule, there must be reason to imagine, from an inspection of the declaration, that the plaintiff has stated the same cause of action in two different counts. The intention of the rule has always appeared to me to be that two counts shall not be allowed, unless it be meant to give evidence of two different contracts. It is manifestly unreasonable that a plaintiff should be permitted to allege the same contract in two different ways. The affidavit that has been read showing that there were in fact two different contracts, the plaintiff is, I think, entitled to the alternative, namely, either to abandon one of the counts, or to be subject to the judgment of a judge at chambers, who may indorse on the summons that he is satisfied that a distinct ground of action is intended to be established in respect of each of the counts. The case of *Cholmondeley v. Payne* (4 Scott, 418) shows that the court may so far review the discretion of the judge, where he has declined to make an order."

3. *Striking out counts—Money paid and special count.*—A declaration contained a count for money paid, together with a count which, in substance, stated that in consideration that the plaintiff, at the defendant's request, had contracted to sell to a third party, in the plaintiff's name and on his credit and responsibility, certain shares in a railway company, of which the defendant was the registered holder; the defendant promised the plaintiff to deliver to him all new shares allotted in respect of such shares, and to indemnify him from all loss which might arise by reason of the non-performance of the defendant's promise. It then alleged the non-delivery to the plaintiff of certain new shares allotted to the defendant; and that, by reason thereof, the plaintiff was forced and obliged to expend and did expend a large sum of money, in order to perform his said contract of sale. It was held that the two counts were not in violation of the rule of *Hilary Term*, 4 Will. 4, r. 5, which prohibits several counts unless a distinct subject-matter of complaint is intended to be established in respect of each. *Simpson v. Rand*, 1 Exch. Rep. 688; 5 C. 17 Law Journ., N. S., Exch. 146.

Mr. B. Parke, in the course of the argument, said: "The defendant does not say 'purchase the shares on my account, and I will pay you again,' but he merely agrees to indemnify the plaintiff from any loss which he might sustain by the non-delivery of the new shares allotted to the defendant."

DEMURRES.

1. *Frivolous—Setting aside.*—To a declaration upon a guarantee, the defendant, who was under terms to plead issuably, demurred generally, on the ground that it disclosed no consideration for the promise stated. A judge at chambers having set aside the demurrer as frivolous, the court rescinded his order, holding that the construction of the guarantee was open to argument, and that the demurrer was, therefore, not frivolous within the rule. *White v. Woodward*, 4 Com. B. Rep. 752.

Per curiam: "Without pronouncing any opinion as to the sufficiency of the declaration, it is enough to say that this demurrer is not so clearly frivolous as to warrant its being set aside. It is settled that a defendant who is under terms to plead issuably may demur generally, though not specially."

See per Alderson, B., in *Papineau v. King*, 2 Dowl. N. S. 226.

2. *Bad plea set aside—Non-assumpsit to bill of exchange.*—When a plea is so manifestly bad (as non-assumpsit to an action on a bill of exchange) that it cannot under any circumstances be supported, the court or a judge will, on application, set it aside, and will not compel the plaintiff to demur. *Robeson v. Ellis*, 2 Bail C. 185.

Per Wightman, J.: "I am informed that my brother Coleridge set aside the plea after a consultation with some of the other judges. Here it is admitted, as it must be, that the plea is clearly bad, and cannot by any possibility be supported; it is something more than demurrable, and in such a case it is unjust to compel the plaintiff to demur. In *Eddison v. Pigram* (16 Law Journ., N. S., Exch. 33) the plaintiff signed judgment, which is far different from the present case, where the plea itself is merely set aside."

DISTRINGAS.

Defendant in a lunatic asylum.—Where it appeared that the proper number of calls were made at a lunatic asylum in which the defendant, a lunatic, was confined, with a view to serve him with a copy of a writ of summons, and the keeper informed the deponent that it was not consistent with the rules of the asylum to allow the lunatic to be seen, and the deponent explained to the keeper the purport of his visit, and on the last occasion of his calls left a copy of the writ with him; the court granted a rule absolute for a writ of distringas to compel appearance, but directed the writ to be served on the defendant's wife, and at his last place of residence, as well as at the asylum. *Mutter v. Foulkes*, 2 Bail C. 252.

See Banfield v. Darrell, 2 Dowl. and Lown. 4; *Limbert v. Hayward*, 13 Mees. and W. 480.

EJECTMENT.

1. *Service of declaration—Danger—Writ of assistance.*—To induce the court to grant a writ of assistance to effect service of a summons

in ejectment, it must be shown to the court that there is actual danger in attempting the service. *Mahr v. Ejector*, 10 Ir. Law Rep. 78.

2. *Unsigned consent rule*.—If the defendant's attorney in ejectment deliver a consent rule without his signature being attached, it is a nullity, and the lessor of the plaintiff is entitled to sign judgment against the casual ejector, notwithstanding an appearance has been duly entered. *Doe dem. Poole v. Willies and others*, 13 Jur. 172.

Per Patteson, J.: "It is requisite to know who is the real defendant; and for this purpose it is necessary that the consent rule should be properly signed. How can it be said that a party is defendant unless it is so signed? The very object of the consent rule is to substitute a real defendant for a mere nominal one; it is in fact a part of the appearance: if not properly signed there is no appearance at all; and, therefore, the delivery of the consent rule without such signature is a nullity. * * It would, however, be hard to say where the defendant swears to merits he should not be let in to plead on terms."

3. *Term to attend inheritance, &c.—Surrender of not presumed—Estoppel—Showing plaintiff not entitled to recover—Evidence—Solicitor producing party's title deeds*.—A., tenant for life, under a power of leasing, created in 1761, granted a lease to the defendant in 1826. In 1844, after the death of A., and before statute 8 & 9 Vic., c. 112, G., the reversioner, brought ejectment, on the ground that the lease was not warranted by the power. It appeared, that, by a marriage settlement in 1708, a term of 1,000 years was created in the property in question for certain purposes, and then to attend the inheritance; and that, in an indenture of the 1st March, 1757, the indenture creating the term was recited, the specific objects of the trust were declared to be satisfied, and the executor of the surviving trustee of the term was required to assign it, to attend the inheritance: held, first, that the surrender of the term was not to be presumed; and that G. could not recover on a demise in his own name. Secondly, That defendant was not estopped from setting up the term, as he did not thereby deny the general title of the lessor of the plaintiff, but insisted upon the prior legal title of a trustee of a term existing for the protection of the estate of the lessor of the plaintiff. At the trial, upon the non-production of the deed creating the term, and the indenture reciting that deed after notice to produce, the defendant, for the purpose of giving secondary evidence of those deeds, called upon the solicitor of a person who had proposed to exchange some property with G., but which exchange had not been carried into effect, to produce an abstract of the deeds; he said that he had not received instructions from his client not to produce it, and that he was ready to do so, if the judge thought he

ought to produce it. The judge thought that there was no sufficient reason why he should not. Held right. *Doe d. George, Earl of Egremont v. Langdon*, 13 Jur. 96.

Per Lord Denman, C. J. : " It was formerly considered that old terms, assigned to attend the inheritance, might, when set up to defeat the title of a person for the protection of whose estate they were assigned, be presumed to have been surrendered (*Doe d. Burdett v. Wrighte*, 2 B. and A., 710, in which all the previous cases are cited and considered). But it has subsequently been held, and we think rightly, that the surrender of a term to attend inheritance is not to be presumed from mere lapse of time, nor unless there be express evidence to warrant such presumption (*Doe d. Blacknell v. Plowman*, 2 B. and Adol., 573). Several cases are cited in Sugden on Vendors and Purchasers, in which Lord Eldon expressed a strong opinion, that to presume the surrender of a term to attend the inheritance would, in most cases, defeat the object intended by the assignment of such terms. It may, therefore, be taken, that after the decision of *Doe d. Blacknell v. Plowman*, down to the passing of the 8 & 9 Vic., c. 112, the surrender of a term to attend the inheritance was not to be presumed from mere lapse of time, and that the omission of a demise in the declaration by the person entitled to the term would defeat an ejectment by the beneficial owner. The statute of Victoria, taking effect only from the 31st December, 1845, does not affect the present case; but it was said that the defendant himself held under the same original title as that under which the plaintiff claimed; and the cases of *Doe d. Colemere v. Whitroe* (1 Dowl. and Ry, N. P. C, 1), and *Barwick d. Mayor of Richmond v. Thompson* (7 Term Rep. 488), were cited. In the first of these cases, it was held that the interest of a tenant for life and a reversioner were the same, and that a lessee of tenant for life could not show adverse title in another at the time of lease granted, but he might show prior title. In *Barwick d. Richmond v. Thompson*, it was held that the tenant could not dispute the title of the person under whom he held as tenant. Neither of these cases are applicable to the present, for the defendant does not deny the general title of the lessor of the plaintiff, but in an adverse action to defeat his lease, insists upon the prior legal title of a trustee of a term to attend the inheritance for the protection of the estate of the lessor of the plaintiff, under whom, as the lessor of the plaintiff contends, the defendant does not hold. There is no rule of law to prevent the defendant setting up the outstanding term in such a case as this; the lessor of the plaintiff himself denying the right of the defendant's lessor to grant the lease. Upon the whole, therefore, we think that the omission of a demise by the owner of the term is a fatal

defect in the plaintiff's case, and entitles the defendant to a nonsuit."

IRREGULARITY.

Applying to court to set aside irregular proceedings.—Although a defect in process be so obvious that it cannot be questioned, and a judge at chambers would have no difficulty in dealing with it, the party seeking to set such process aside has a right to come in term time to this court for the purpose, and the rule adopted in the Common Pleas (*White v. Feltham*, 16 Law Journ., N. S., C. P. 14) of making the rule absolute, without costs in such cases, is not recognised by this court. *Lomas v. Price*, 2 Bail. C. 193.

Per Erle J.: "I have no jurisdiction to go to the extent asked for by the plaintiff, nor can I act upon the case decided in the Common Pleas (*White v. Feltham*, *suprà*), it not having been recognised as the practice in this court."

JOINT-STOCK COMPANY.

Winding-up Act—Execution against shareholder.—[See *ante*, p. 13—16].—Where judgment has been obtained against a joint-stock company, completely registered under the 7 & 8 Vict. c. 110, which becomes insolvent, and an order is made by the Court of Chancery for winding-up its affairs under the 11 & 12 Vict. c. 45, and an official manager appointed for that purpose, the plaintiff ought to seek satisfaction for his debt by means of the machinery provided by the latter act; and the court will not grant execution against a shareholder under the former, unless it is shown that those means have been resorted to without success. The 68th section of the 7 & 8 Vict. c. 110, which empowers the court to grant execution in certain cases without a *scire facias* or suggestion, applies to the case of a creditor who has obtained judgment against a joint-stock company, and seeks execution against a shareholder in it; but such execution will not be granted by the court unless they are satisfied that the plaintiff has first used diligence to obtain satisfaction for his debt from the funds of the company. *Thompson v. Universal Salvage Company*, 13 Jur. 104.

Per Parke, B., "The first question is whether since the 7 & 8 Vict. c. 110, execution in lieu of a suggestion or *scire facias* can issue under circumstances like the present, and if the Court of Common Pleas in *Peart v. Universal Salvage Company* (18 Law Journ., N. S., C. P. 23), were right in their decision as to the effect of this statute. The contest there was whether under the 68th section, the proceeding by *scire facias* or suggestion on a judgment obtained against such a company as this was abolished only in case of execution sued against the company by shareholders in it; on which that court decided on what I take to be the true construction of that section, that it does not apply solely

to that case. * * The result, therefore, will be that the 68th section does not apply to a proceeding by a shareholder merely, but to all cases where a creditor may sue the company, and who has thus now a direct remedy for his debt, as the court or a judge is empowered to grant him execution. Under the former act, 7 & 8 Geo. 4, c. 46, he was obliged to have a *scire facias*, which by long experience we know to have been an inconvenient proceeding. Then the present statute gives a discretion to the court or judge to determine all questions which formerly would have been determined on *scire facias*, viz., if the person against whom execution is asked is a shareholder, which they may decide according to their discretion on affidavit, or if necessary, under their general power of granting an issue to try it; and their discretion must be regulated with the view, not whether equitably the party ought to be called on to pay, but whether he is a shareholder liable to contribute to pay the debts of the company. * * Then the 11 & 12 Vict. c. 45 (see vol. i., p. 63—65) where it is wrongly stated as chap. 78), puts an insolvent company in a different position, and directs its affairs to be administered under a Master in Chancery, who is to collect the effects of the company, and have power to call on each individual person liable to contribute in order to compel him to contribute, and thus provide a fund for payment of the partnership debts. If so we must see what is the construction of the 73rd section of that act; and the effect of it is, that all persons who are creditors of an insolvent company shall, instead of suing the company in the first instance, prove their debts under that statute, and thus obtain payment for it through the means of the Master in Chancery. That mode of obtaining satisfaction for such debts has been substituted by that statute for the direct remedy given by the former one; but if that should prove abortive this court will, in the exercise of its discretion, permit the creditor to proceed directly against the persons liable to contribute to pay the debts of the company."

JUDGE'S ORDER.

Irregularity—Rescinding order—Delay.—An order having been made on the 6th July, 1846, by a judge at chambers, to set aside a verdict obtained under a writ of trial, on the ground of the insufficiency of the notice of trial: held, that the order was merely irregular, and not a nullity; and, therefore, that an application on the last day of Trinity Term, 1847, to rescind it, was too late. *Orgill v. Bell*, 1 Exch. 466; S. C. 5 Dowl. and L. 217.

Per Alderson, B.: "It is a mere irregularity. The order was erroneous, and, if the application had been made within a reasonable time, the order would have been set aside."

JUDGMENT.

Nunc pro tunc.—*Verdict subject to award*.—*Death of party*.—In February, 1844, by an order *at nisi prius* a verdict was taken for the plaintiff, subject to arbitration. In Michaelmas, 1846, a balance was found to be due by the plaintiff, and a verdict entered up for the defendant, who died on a day in that same term prior to the entry of the verdict for him. The court held that the proceedings were regular notwithstanding, and directed that the judgment, as against the plaintiff, be enrolled as of the first day of Easter Term, 1844, *nunc pro tunc*, without prejudice to the rights of third parties. *Wright v. Kome*, 10 Irish Law Rep. 97.

Per Pennefather, B.: "I think we are to consider the verdict just as if it was given for the defendant on the first day of Michaelmas Term, when all the parties were alive."

MOTION.

1. *Renewing application where former motion refused through mistake, &c.*—A judgment signed in an action brought by A., in the name of B., having been set aside by a judge's order, a rule nisi was obtained to rescind that order, on the ground that the summons upon which it was made had been improperly altered by the defendant's attorney. This rule, which by mistake purported to have been moved on behalf of B., was discharged upon an affidavit of B., showing that the rule had been moved without any authority from him, and that the alteration in the summons had been made with his sanction. Held, that a second application for the same purpose might be made on the behalf of A., the party really interested. *Tilt v. Dickson*, 4 C. B. 736.

Per Wilde, C. J.: "The rule which prohibits the making a second application upon the same ground that a former unsuccessful one has been made, is one of very considerable importance. * * * Having carefully looked into the cases it appears to us that this rule may be made absolute, without in any degree trenching upon the considerations on which the rule depends. The strict practice has been relaxed where the first application has failed in consequence of a clerical error, or from the affidavit having been incorrectly entitled. And we think this case is analogous to those where the failure has arisen from a mere technical defect, which is wholly beside the merits. It is obvious that the rule was in the first instance moved on behalf of A., and that it was by a mere slip drawn up as a rule moved on behalf of the plaintiff."

2. *Notice of, stay of proceedings.*—A judge's order staying the proceedings until a given day, in order to afford time for an application to the court, does not dispense with the necessity of the ordinary notice of motion, in order to entitle the party to have his rule nisi

drawn up with a stay of proceedings. *Belcher v. Goodered*, 4 Com. B. 472.

• NONSUIT, JUDGMENT [*ante*, p. 12.]

1. *Peremptory undertaking—Drawing up and serving.*—Where a rule for judgment as in case of a nonsuit has been discharged upon the plaintiff's giving a peremptory undertaking, and the plaintiff never draws up the rule or fulfils his undertaking, it is not necessary in the Court of Queen's Bench, in order to entitle the defendant to judgment absolute as in case of a nonsuit, that he should draw up, and serve the rule within the time limited by the peremptory undertaking. *Landells v. Ball*, 5 D. and L. 62; S. C. 11 Jur. 1038.

Per Wightman, J.: "The Master says the practice of this court is, that when a rule is discharged on a peremptory undertaking it is incumbent on the plaintiff to draw up the rule. He is bound to take notice of it at his peril. The practice seems reasonable. There could be no doubt on the matter except for the cases cited of *Gingell v. Bean* (1 M. and S. 50) and *Knight v. Smith* (6 M. and S. 1016) in the Common Pleas, the former of which was followed in *Sawyer v. Thompson* (9 Mees. and W. 248) in the Exchequer, a decision of Alderson, B., sitting alone, which decided that on a rule being discharged a plaintiff is not bound to take notice of the rule unless served upon him. Such has been the practice in the Common Pleas; and it does not appear what has been the practice of the Exchequer, as Alderson, B., decided on the authority of *Gingell v. Bean* only. In the absence of a general rule in deciding a case, I shall do so in accordance with the practice which prevails in this court."

2. *Rule discharged on peremptory undertaking—Drawing up and serving.*—Where a rule nisi for judgment as in case of a nonsuit has been discharged upon a peremptory undertaking by the plaintiff to try within a given time, it is the duty of the plaintiff to draw up, within that time, the rule containing the undertaking. If the plaintiff do not proceed to trial according to his undertaking, the defendant may, by the practice of the Court of Queen's Bench, obtain a rule absolute for judgment as in case of a nonsuit for not proceeding to trial, without serving upon the plaintiff the rule containing the plaintiff's undertaking, and without inquiring whether the plaintiff has drawn it up. *Nathan v. Storey*, 13 Jur. 148.

See accord. *Landells v. Ball*, 5 Dowl. and L. 62; S. C. 11 Jur. 1038, stated *supra*. The rule in the Common Pleas is different, *Gingell v. Bean*, 1 Man. and Gr. 50, 555; *Knight v. Smith*, 6 Man. and Gr. 1016. *See supra*.

PARTICULARS.

Order for—Rescinding order and signing judgment of non pros.—The defendant had obtained an order for particulars of plaintiff's

demand before declaration, with a stay of proceedings until delivery. After two terms had elapsed without such delivery, he obtained an order to rescind his former order, and served it, with a demand of declaration within four days. No declaration having been delivered within the four days, he signed judgment of *non pros*: held, that the judgment was regular. *Johas v. Saunders*, 5 D. and L. 49.

Per Erle, J.: "The plaintiff contends that he had the same time for declaring after the order rescinding the order for particulars had been obtained, as he had when the order for particulars was obtained. But I am of opinion that the judgment was regular. The non-delivery of particulars by the plaintiff was a default on his part, and his default does not deprive his opponent of any benefit from the lapse of time."

PAYMENT INTO COURT.

Pleading without bringing money into court—Several actions for same debt.—The plaintiffs having brought separate actions against two directors of a railway company for the same amount, and the defendant in the one action having paid into court a sum of £300, the court allowed the defendant in the other action (even after notice of trial) to plead payment into court of the £300, without actually paying it in. *Rendel v. Malleison*, 5 Railw. Cas. 146; S. C. 16 Mees. and Wels. 828.

Per Alderson, B.: "On payment of costs there will be a rule absolute for inserting on the record a plea of payment into court of £300, without actually paying in the same."

PLEAS.

1. *Form of declaration in debt*—*Answering damages*.—In framing a plea to a declaration in debt, care should be taken to answer, directly or indirectly, not only the debt as to which the plea is pleaded, but also the damages consequent thereon; for a plea pleaded to parcel of the debt only, excluding the damages, will be insufficient (see *Lowe v. Steel*, 15 Mees. and W. 380; *Henry v. Earl*, 8 Mees. and W. 228). However, in a late case, it was held that a plea of payment in debt pleaded to a count will be considered to be pleaded as an answer as well to that part of the damages in the declaration applicable to the detention of the debt mentioned in that count as to the debt itself in that count. *Gell v. Burgess*, 13 Jur. 194.

Per Wilde, C. J.: "The damages at the end of the declaration are supposed to attach to something in some other part of the declaration, because, the action being in debt, the declaration contains nothing in the way of damages, except by referring to the several matters in the previous counts. The plaintiff begins his declaration by complaining that a certain debt is due to him from the defendant; and he sets out the several causes of complaint in respect of which that debt is due, and then concludes his declaration by alleging,

that, by reason of the detention of the whole debt, the plaintiff has incurred damage. Now to what is that damage to be referred but to the matters of complaint previously set forth? If the damage was to be severed and applied to the several causes of complaint stated in the declaration, it is plain that the effect of the declaration would be to read so much of the damage into the several counts, *reddendo singula singulis*, as might be applicable. Then the question is, whether the plea, which professes to answer the residue of the first and last counts, answers all the matter which substantially is in those counts. Does the plea answer the damage? It seems to me that it does answer the damage, which must be taken to form part of those counts. The introductory part of the declaration, which complains of the detention of the debt, overrides the whole declaration; and it seems, therefore, to me, that the plea answers the damage in the first and second counts; and that the judgment, therefore, was irregularly signed."

2. *Pleading several matters—Public company—Calls—Shareholders—Creation of new shares—Meeting.*—Where a company incorporated by statute sues a party for calls in the manner pointed out by the 8 Vict. c. 16, ss. 26, 27, the defendant under a traverse of his being a shareholder in the company is not confined to disputing that he is such *de facto*, but may show that he is not a shareholder *de jure* so as to be entitled to share in the profits of the concern. In such an action, where the special act incorporating the company enacted that the provisions of the general act relative to the distribution of the capital of the company into shares, and the means of enforcing the payment of calls, &c., so far as they were not inconsistent with that act, should be incorporated with it; and also that new shares might be created by the company in such a manner as might be or as might have been agreed upon at any general meeting of the company; the court allowed the defendant to plead *nonquam indubitatus* with traverses of his being a shareholder and of the making the calls; but refused the additional pleas that no meeting of the company had been called before the shares were created, and that they were not agreed to be created at such a meeting. *Shropshire Union Railway and Canal Company v. Anderson*, 13 Jur. 175.

Per Pollock, C. B.: "This rule must be discharged. Generally speaking, if we entertain a doubt on the subject we ought to allow the pleas which it is proposed to plead; but I must say I think we ought not to allow them, because by possibility some other court may hold them good. I do not think that this is the principle on which rules of this kind ought to be asked for; as if that were so, no plea could be allowed or struck out until the

House of Lords had decided whether it were a good or a bad one. The rule in general has been to permit more than one count to a plaintiff, or more than one plea to a defendant, where there is any reasonable doubt, that either plaintiff or defendant in each respective case will suffer hardship or injustice in the event of its being refused. But if, in our judgment, it is clear that in substance this plea is but a denial that the defendant was a shareholder in this company, I think we ought not to allow it; and I am at present of opinion that that is the case. It appears to me that if the mere object of the proposed pleas is to take advantage of some matter of form to defeat the plaintiff's claim, the general act intended to exclude such means of defence. I collect from the language of the Legislature in saying that the plaintiff company shall only prove such things, it was their intencion to prevent the defendant from taking objections which did not arise on those particular matters. If, however, the defence be of such a nature as to show that the defendant is not a shareholder in the company, the Legislature did not mean to exclude that defence; and the whole matter, therefore, comes to this—if this is a substantial matter you will have the benefit of it under the other pleas which have been allowed you; but if it is only a formal one, the act intended to exclude it."

RECORD.

Altering without leave—Setting aside verdict.—The court will not permit a party to retain a verdict upon a record which has been improperly altered by him. Therefore, where a declaration on a bill of exchange stated it to be payable at three months, and contained counts for goods sold and delivered, and on an account stated; the bill, as produced at the trial, was made payable at two months, and, on the record being referred to, appeared payable in like manner at two months, but the word "two," in the record, had been written on an erasure; the plaintiffs having obtained a verdict, the court set aside the record and all subsequent proceedings, refusing leave to the plaintiffs to retain their verdict on the account stated. *Suker v. Neale*, 1 Exch. Rep. 468; S. C. 17 Law Journ., N. S., Exch. 56.

REPLICATION.

De injuria—Bill of exchange—Excuse for non-payment—Accommodation bill—Special agreement.—Assumpsit by indorsee against acceptor of a bill of exchange. Plea, that the bill was accepted for the accommodation of the drawer, and that, at the time of accepting it, it was agreed between the drawer and the defendant, that the drawer should pay it when due, and that if he should negotiate or part with it to any holder, such holder should deliver it to the drawer before or when it became due, to enable him to take it up, and should

not retain it after it became due; that the drawer indorsed the bill to plaintiff with notice, and that plaintiff received and always held the bill on the above terms. Replication *de injuria*: held, that the plea, showed an excuse for non-payment; and, therefore, the replication was good. *Robinson v. Little*, 13 Jur. 149.

Per Lord Denman, C. J.: "The question is, whether this plea shows an excuse for non-payment, or amounts to an argumentative denial of the indorsement by the drawer to the plaintiff. The cases of *Adams v. Jones* (12 Adol. and Ell. 455; S. C. 4 Per. and D. 174); and *Marston v. Allen* (8 Mee. and W. 494; S. C. 1 Dowl. N. S. 442), were much relied on by the defendant; but they are distinguishable from the present. In both those cases the supposed indorser's name was written on the bill, but he had not delivered the bill to the plaintiff, as intended holder, to take any interest; the facts specially set out were, therefore, properly held to be an argumentative denial of the indorsement. Here, on the contrary, the plea shows that the bill was indorsed to the plaintiff, as holder conveying and intending to convey to him such interest as the drawer himself had and no more; that is, in effect, to make the plaintiff the legal indorsee and holder of the bill, but restricting him from enforcing it against the defendant, the acceptor. A plea in an action by the drawer against the acceptor, that the bill was accepted for the accommodation of the drawer, is manifestly a plea in excuse, and open to a replication *de injuria*; and this plea is, in effect, a similar one. The fallacy is in supposing that the averment of indorsement contained in the declaration necessarily, and at all events, means such an indorsement as gives a right of action against the acceptor. Undoubtedly it does so mean *prima facie*; but it may be answered by a plea showing an indorsement in fact, but accompanied with such circumstances and conditions as to preclude the indorsee from enforcing it against the acceptor; in other words, to give the acceptor an excuse for not paying the amount to the indorsee; and the plea in question is exactly such a one. Other cases were cited, but they are not in point. We may, however, observe that the most recent of them, *Washbourn v. Burrows* (1 Exch. Rep. 107), *Bennett v. Bull* (*Id.* 593; 11 Jur. 1067); *Mortimer v. Gill* (4 C. B. Rep. 543), all go to show that the replication *de injuria* is not now narrowed so much as it appears to have been at first after the new rules. We may also advert to the case of *Herbert v. Sayer* (5 Q. B. Rep. 965; 8 Jur. 812), where this court held the replication good to a plea very much involving the same point as the present case."

SCIRE FACIAS.

Joint-stock banking company—Plea in abatement—Another scire

facias.—It is no plea to a declaration in *scire facias* against a member of a joint-stock banking company, on a judgment obtained against the public registered officer of the company, under 7 Geo. 4, c. 46; that another writ of *scire facias* on the same judgment has been sued out against another member of the company. *Nunn v. Lomer*, 13 Jur. 286.

Per Parke, B.: "Our judgment must be for the plaintiff. The proceeding given by this statute is different from the remedy which the plaintiff would have had against the parties at common law. The statute says that execution on a judgment against the public officer of a joint-stock banking company may be issued against any member or members for the time being of the company or co-partnership. These words do not mean that the plaintiff is merely to have the alternative of suing one or all of those members, but that he may at his discretion proceed against any one or more of them; and we so held the other day in the case which has been mentioned of *Burmester v. Cropton*. I, therefore, think he may, in the exercise of that discretion, have concurrent writs going on at the same time. When the debt is paid an *exoneratur* will be entered."

SPECIAL CASE.

1. *Consent to judge's order for special case—Conditional—Special verdict, not allowable—Refusing to hear case.*—The 25th section of the 3 & 4 Will. 4, c. 42, makes it lawful for the parties in any action after issue joined, "by consent," and by order of any of the judges of the superior courts, to state the facts of the case in the form of a special case, for the opinion of the court, &c.: held, that the consent must be absolute and unconditional. Where, therefore, a special case, was stated under this act, and a right was reserved to either party to turn the special case into a special verdict, the court refused to hear it. *Engstrom and others v. Brightman and others*, 17 Law Journ., N. S., C. P. 142; S. C. 12 Jur. 337,

Per Maule, J.: "This is a most inconvenient practice; I am not disposed to agree that it shall be pursued without the leave of the court. Indeed, I do not think that this agreement is such as to give us the power to hear the special case at all. Besides, the facts must be found in a special verdict, and then a court of error, in reviewing our decision, will have to decide upon a different state of facts from that which guided us. * * The agreement here is to take the judgment of the court on the special case, with a condition that either party may turn it into a special verdict, but the act which gives authority to state a special case, and that only, requires the consent to be absolute and unconditional."

2. *Refusing to hear—Not bond fide.*—The court refused to give judgment in a special case stated for the opinion of the court, under the 3 & 4 Will. 4, c. 42, s. 25, it appearing that the action was not

bona fide brought to try a question really in contest between the parties to the cause. *Doe dem. Dunise v. Dunise*, 17 Law Journ., N. S., C. P. 220.

Per Wilde, C. J.: "Some doubt is entertained as to the construction of the will, and without any real contest or without any view of recovering the possession, an ejectment has been brought merely for the purpose of making it the foundation of a case whereon to ask the opinion of the court. The affidavit satisfies us that this is merely a mode of asking the court to give an opinion upon a matter not in dispute in the cause, but upon which the parties desire information. [This affidavit was required by the court on a suspicion that the action had not been brought to determine a matter really in dispute inasmuch, as it did not appear how or by what claim the defendant was in possession of the premises, and the declaration contained no count on a demise by the devisees of A. B., who would be the party really entitled to the property, if the argument for the lessor of the plaintiff were correct.] If the court could entertain the question as it is now brought before it, every doubt upon a marriage settlement, and every doubt upon the construction of a will, might be brought before us (long before any question arose, and probably when no question ever would arise) by merely adopting the machinery of an action of ejectment, and by agreement. We, therefore, do not think ourselves authorised to proceed to any judgment."

NOTE.—The only effect of this decision will be to make parties more careful in giving an air of *bona fides* to their cases.

SPECIAL VERDICT.

Time Commutation.—*Special finding on issue*.—Issue under stat. 6 & 7 Will. 4, c. 71, to try whether a modus extended over all the lands of a township except the glebe, the lands inclosed under an inclosure act, and an ancient farm called F. On the trial the proof was of payments made for the old inclosures, except F., the inclosures under the act, and the glebe. The judge refused to amend the issue, but under sect. 24 of stat. 3 & 4 Will. 4, c. 42, directed the jury to find the fact according to the evidence, and their finding was stated on the record: held, that the direction was wrong; and the finding was expunged. *Brown v. Hutchinson and others*, 13 Jur. 190.

STAYING PROCEEDINGS.

Third summons of judge.—By Reg. Gen. Trin. Term, 1 Will. 4, r. 9, "it shall not be necessary to issue more than two summonses for attendance before a judge upon the same matter; and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shown to the contrary." A third summons taken out, where two only are required, by Reg. Gen. Trinity Term, 1 Will. 4, is no stay of proceedings.

Haskins v. Williamson, 17 Law Journ., N. S., Exch. 280; S. C. 12 Jur. 659.

Per Parke, B.: "If a third summons is to be considered as a stay of proceedings, would a fourth, fifth, and every subsequent one be so too; for if so, the parties might go on staying the proceedings *ad infinitum*. I think the Reg. Gen. Trin. Term, 1 Will. 4, is obligatory, not optional."

TERM'S NOTICE.

1. *After delay of twelve months or four terms*—*Term's notice of trial*.—Where no step has been taken in a cause for a period of one year in the Queen's Bench, or in the Common Pleas for four terms (excluding the term in which the last proceeding was had), the courts, in order to prevent the parties being taken by surprise, require that either party intending to take any further proceeding towards judgment in the cause shall give to the other a term's notice thereof. This notice is not required in certain cases of a defendant moving in consequence of plaintiff's laches or errors; nor to proceedings after verdict where no new trial is moved for, nor to proceedings after final judgment. And in no case is such notice required where the proceedings were suspended by injunction, by consent, or at defendant's request (1 Chitty's Arch. Pract. 132, 8th edit.; Pract. Com. Law, 55). Where in the Court of Common Pleas, there have been no proceedings within four terms, or in the Queen's Bench within a year, after issue joined, a term's notice of the plaintiff's intention to proceed must be given before he can give notice of trial; it is not enough to give a term's notice of trial. *Tilley v. Collins*, 4 C. B. Rep. 758.

Per Wilde, C. J.: "I do not know that we are authorised to depart from a positive rule of practice, which requires a plaintiff, before he is allowed to take another step, to give a term's notice of his intention to awake a cause that he has permitted to slumber during four terms. A notice of trial is a proceeding in the cause. In the absence of any authority to the contrary, we must conclude this notice to be irregular."

2. *Cognovit*.—A plaintiff may enter up judgment on a cognovit even after seven years from its date without giving a term's notice. *Thompson v. Langridge*, 5 Dowl. and L. 213; S. C. 1 Excheq. Rep. 351; 17 Law Journ., N. S., Exch. 4; stated *ante*, p. 5.

3. *Proceedings after verdict*.—The rule that a term's notice is necessary where no proceeding has been taken in a cause for a year, does not apply to proceedings had after verdict. *Newton v. Boodle*, 3 C. B. Rep. 795; S. C. 4 Dowl. and L. 664; 16 Law Journ., N. S., C. P. 135; 11 Jur. 148.

TRIAL, NOTICE OF.

Continuance, notice by.—Irregular as such but otherwise good notice

—*Setting down cause.*—It is immaterial that a notice of trial purports to be the continuance of a former notice which is void, if it be delivered in time, and clearly and unequivocally inform the defendant that the plaintiff intends to proceed to trial in the cause at a certain specified time. It is not necessary that notice of trial shall have been given before a cause can be regularly set down for trial. *Ginger v. Pycroft*, 2 Bail C. 254; S. C. stated *ante*, p. 16.

TRIAL.

1. *Practice at—Right to begin—New trial.*—The court will not set aside a verdict on the ground that the wrong party was allowed to begin, unless it appears that some manifest injury has resulted therefrom. *Edwards v. Matthews*, 4 Dowl. and L. 721; S. C. 16 Law Journ., N. S., Exch. 291; 11 Jur. 398.

Per Pollock, C. B.: "It appears that the rule adopted in the Court of Exchequer is this, that the plaintiff or defendant having been called on when the proof of the issue lay on his adversary, is not a sufficient ground for a new trial, unless it is manifest that the course of justice has been thereby interfered with, and some substantial injury effected at the trial of the cause (see *Geach v. Ingall*, 14 Mees. and W. 95; S. C. 9 Jur. 691. Also in *C. P. Doe dem. Bather v. Brayne*, *suprà*). I own my impression at one time was, that a miscarriage as to who should begin was so important a matter, and might in many instances interfere so much with the course of justice, that we ought always to interfere and correct it; but on referring to the judgment of the court in the cases to which I have alluded, we must now take it as settled that the question whether any injury has been done by the erroneous ruling of the judge at *nisi prius*, is involved in the question of the propriety of granting a new trial for it. In the present case there has been no injury done—the trial was of an issue directed for the purpose of informing the conscience of the court, and on looking at all the evidence we think that the verdict was right, and consequently ought not to be disturbed."

2. *Practice at—Right to begin—Replevin.*—In replevin, the defendant avowed for a distress for rent, and plaintiff pleaded that the goods were taken between sunset and sunrise; and defendant replied, that the goods were taken between sunrise and sunset, without this, that they were taken between sunset and sunrise. It was held that on these pleadings the plaintiff had a right to begin. *Tunncliffe v. Wilmot*, 2 Car. and Kirw. 626.

VENUE.

Fire insurance policy—View necessary—Witnesses residing out of county.—In a motion by an assurance company, to change the venue after issue joined, to the county in which the fire took place, on an allegation that a view is necessary for the defence, the court

will not grant the motion unless the reason why such a view is necessary appears on the face of the affidavit. The mere statement in the affidavit that a view is necessary is insufficient. Motion by defendant to change the venue, after issue joined, to a county, because the witnesses for the defence reside there, is sufficiently met by the plaintiff on an allegation that the majority of his witnesses reside in the county in which he has brought the action. *Semble*, on behalf of a defendant the court will be slow to change the venue to a county in which the father of the attorney for the defendant is sub-sheriff. *M'Laughlin v. Royal Exchange Company*, 9 Ir. L. R. 510.

Per Pigot, C.B.: "The plaintiff has offered, if the defendant will undertake to abandon all other pleas, and go to trial on that plea alone on which it might become advisable to have a view, that in that case he will consent to change the venue to Sligo; the defendant has refused that offer, and, coupling that refusal with the affidavit of the agent, we conceive that the view required is not necessary. It has been said that the affidavit is in conformity with the precedents, and therefore sufficient, but that is clearly a mistake." See note to *M'Donne v. Carr*, Hayes, 377; see also *Hodinott v. Cox*, 8 East, 286.

WITNESS.

1. *Commission providing for time and place of examination—Examining witnesses apart—Return of commission.*—A judge ordered a commission to issue for the examination of witnesses *vidv voce* at Newfoundland, returnable on a certain day. The commission commanded the commissioners to summon the witnesses at a certain day and place to be appointed by them for that purpose in Newfoundland, and then and there examine them apart on their oath *vidv voce*, and reduce the examinations into writing, and directed them to send the same on or before the return-day of the commission, closed up under their seals, together with the commission. At the trial a clerk from the Master's office produced a packet of papers which he had received sealed up from a person who brought it to the office, but whom he did not know. The commission produced was identified as that issued under the order, and it was proved that the papers professing to be the return were in the handwriting of the commissioners. The depositions purported to contain separate examinations. Held, first, that the place, the time, and the manner of examining witnesses were regularly provided for by the order and commission. Held, secondly, that it was to be presumed that the witnesses were examined apart. Held, thirdly, that there was sufficient proof of the due return of the commission. *Simms v. Henderson*, and *Henderson v. Henderson*, 12 Jur. 773; S. C. 17 Law Journ., N. S., Q. B. 209.

Per Denman, C.J.: "It appears to us that the place, the time, and the manner of examining witnesses were regularly provided for, Com. Law.]

as they were to be examined *visd voce* at Newfoundland before the return day of the commission. It is to be presumed that they were examined apart, as the depositions purport to contain separate examinations, and there is no reason for supposing that they were examined together, and the presumption is that the commissioners did their duty."

2. *Commission to examine witnesses—Order—Specifying place of examination and commissioners' names—Proof of commission.*—A judge's order for a commission to examine witnesses abroad, under 1 Will. 4. c. 22, s. 4, must specify the place at which such commission is to be executed, or the deficiency must be supplied by a subsequent order. *Semble* (by Coleridge, J.), that the names of the commissioners must also be specified in a subsequent order, if not named in that authorising the commission. *Semble*, that, if the judge's order is not produced at the trial, the commission itself is *prima facie* evidence that it issued properly, and that the proceedings under it were rightly conducted. *Greville v. Stutz*, 12 Jur. 49; S. C. 17 Law Journ. Q. B. 14.

Per Coleridge, J.: "I am clearly of opinion that the order should name the place. No one can read the statute without seeing that its meaning is, that all the circumstances under which the commission is to issue are to be settled on a preliminary application to a judge or the court. In commissions issued within the jurisdiction it is expressly provided that the first order must state who the commissioners are; but it is not so in the case of a foreign commission. The order in that case issues, so to speak, in blank, but that must be afterwards supplied. I am not sure that a commission does not *ex vi termini* mean that somebody must be named to execute it. Here it is contended that a party may take an order to the officer of the court, and put in the name of any person he chooses to execute the commission. I cannot think such is the meaning of the statute."

NOTE.—In a subsequently-reported case (*Nichol v. Alison*, 17 Law Journ., N. S., Q. B. 355) it was expressly decided that a judge's order for a commission to examine witnesses need *not* contain the names of the commissioners, as they are to be ascertained by subsequent arrangement between the parties. It was a commission to take the examination of witnesses abroad.

3. *Competency—Malicious prosecution—Defendant suffering judgment.*—On the trial of an action for a malicious prosecution against two defendants, one of them who has suffered judgment by default is a competent witness for the plaintiff. *Hadrick v. Heslop*, 17 Law Journ., N. S., Q. B. 313; S. C. 12 Jur. 600.

Per Lord Denman: "Formerly it seems to have been considered that a party to the record, as such merely, was incompete-

tent, but that doctrine is now finally overruled (*Worrell v. Jones*, 7 Bing. 395); and the true criterion is held to be, whether the proposed witness is or is not interested to obtain a verdict for the party calling him. In cases of contract, a defendant who has suffered judgment by default is not competent for the other defendant, because he is directly interested to procure a verdict for him, since such verdict would enure to his benefit, notwithstanding the judgment by default. But for the same reason he is competent for the plaintiff, his direct and predominating interest being against the plaintiff who calls him, though he has a conflicting interest to fix the other defendant jointly with himself (*Pipe v. Steel*, 2 Q. B. Rep. 733)." His lordship, after noticing some authorities, proceeded, "As to the interest of the witness, no doubt he has an interest to fix the other defendant, because it may be that the plaintiff, having recovered against both, will take his execution against the other defendant, and not against the witness, and in general (subject to some exceptions which are not shown to apply here) there is no contribution between defendants in actions of tort. On the other side it was said that such an interest is contingent, and too remote and uncertain to be regarded, as it was considered to be in the case of *Doe, d. Harrop v. Green* (4 Esp. 198), decided by Lord Ellenborough. In order to meet this view of the case, the learned counsel for the defendant Heslop cited numerous authorities to show, first, that if the plaintiff succeeded against Heslop, his execution must be jointly against both Heslop and Raine. This is so, no doubt, but it is equally clear that, under a writ of *feri facias* against both, he might levy on the goods of one only. Secondly, that no execution could be taken out against the lands of Raine, though the judgment at once becomes a charge on them until all the goods of Heslop as well as Raine should have been exhausted. The principal authority for the position seems to be in 2 Inst. 395; and it being clear that the execution, of whatever nature it be, must be joint, the position may be correct. But there is nothing in the statute of Westm. 2, which gives the *elegit*, to prevent him from suing out an *elegit* against both, and taking the goods of one to satisfy his debt, though if he take the lands, he must take the lands of all; so that the argument at last comes to this, that the witness had a direct interest to obtain the verdict against his co-defendant, and make him liable, on account of the possibility that the plaintiff may take his execution against him only, or against the goods and lands of both. We think this too remote and contingent an interest to render the witness incompetent, for this reason: we cannot see on what ground a joint trespasser not a defendant can be held competent, as his evidence might wholly discharge himself. Now,

Lord Tenterden, in his judgment in *Blackett v. Weir* (5 B. and C. 387), says, 'In actions of trespass witnesses apparently open to a much stronger objection are constantly admitted. In that action a recovery against one of several co-trespassers is a bar to an action against the others; and yet scarcely a circuit passes without an instance of a person who has committed a trespass being called to prove that he did it by command of the defendant. In that case a verdict for the plaintiff would operate as a discharge to the witness, there being no contribution in actions of tort.' The same proposition of law is stated as perfectly clear, as well known, in *Moore v. Daubigny* (5 B. Moore, 319).

4. *Competency—Bankrupt—Creditor of bankrupt.*—Where, in an action by the assignees, the bankrupt was not called as a witness, but a witness was examined as to certain statements of the bankrupt with respect to his affairs: held, that the evidence was admissible. Where a creditor under the fiat was produced as a witness: held, that his evidence was inadmissible. *Belcher v. Brake*, 2 C. and K. 658.

Per Wilde, C. J.: "A creditor under a fiat must be considered a person on whose immediate and individual behalf the action has been brought; he is therefore not rendered competent by that act."

NOTE.—This was only a *nisi prius* decision, and we believe it is contrary to the general opinion of the profession.

5. *Competency—Justifying under party—Cognisance.*—Where the defence rested on several cognisances, it was held by Wilde, C. J., at *nisi prius*, that a person under whom one of such cognisances was made was competent to prove matters distinct from, and independent of, that particular cognisance. *Walker v. Giles*, 2 Car. and K. 671.

TRIAL.

1. *Practice at—Right to begin* [*ante*, p. 40].—The right of a party at a trial to begin is one of great importance, and for which a struggle is frequently made. The general rule is that the party who has to maintain the affirmative of the issue must begin to give the evidence. Where there are special pleadings, or where a special defence is not intended to be given in evidence under the general issue by statute, it may perhaps be more accurate to say that the party who has added the *similiter* shall begin. If both parties, however, have added a *similiter* to different sets of pleadings in the same cause, then the plaintiff usually begins, and proves those issues which are essential to his case; and then the defendant does the same, and afterwards the plaintiff is entitled to go into evidence to controvert the defendant's affirmative proof, &c. The judges have resolved that in cases of *slander*, *libel*, and other actions for *personal injuries*,

where the plaintiff seeks to recover *actual damages*, of an unascertained amount, he is entitled to begin, even though the affirmative of the issue may in point of form be with the defendant (*Carter v. Jones*, 6 Car. and P. 64). In an action of trespass the defendant pleaded a justification, setting up an affirmative right in himself, which right the replication traversed. At the trial the plaintiff's counsel claimed the right to begin. The judge asked whether he would undertake to proceed for substantial damages, and, on counsel declining so to undertake, allowed the defendant to begin. On motion to the court, it was held that the judge was correct. *Chapman v. Rawson*, 8 Q. B. Rep. 673; S. C. 15 Law Journ., N. S., Q. B. 225; 10 Jur. 287.

2. *Practice at—Right to begin—Admission—New trial—Ejectment.*—In ejectment the lessor of the plaintiff claimed under a will of the testator, dated the 23rd of September, 1844. The defendant claimed under a subsequent will of the same testator, dated the 30th of December, 1844. The defendant admitted that the will of the 23rd of September was a perfect will in every respect, and upon that admission claimed the right, and was allowed by the judge to begin at the trial. It was held on motion to the court that the admission of the defendant was not an admission of the whole of the plaintiff's case, and therefore the right to begin had been improperly conceded to the defendant. It was also held that, if it appears to the court that the party entitled to begin at the trial has been deprived of that right, and that his cause has been thereby substantially prejudiced, a new trial will be granted. *Doedem. Bather v. Brayne*, 17 Law Journ., N. S., C. P. 127.

NOTE.—This case is the one referred to at p. 40, and it ought, with the preceding case, to have been inserted before the case of *Edwards v. Matthews*, *ante*, p. 40.

WRIT OF SUMMONS.

Service—Company—Secretary—Clerk in the office of company.

—In an action against a trading or other company or body within the meaning of the 7 Will. 4, and 1 Vict. c. 73, the service of any summons, demand, or notice, or any writ or other proceeding at law or in equity, or otherwise, on the clerk of the company or body, or its being left at the head office for the time being of the company or body, or in case such clerk of the said office shall not be found or known, their service thereof on any agent or officer employed by the said company or body, or his leaving the same at the usual places of abode of such agent or officer, will be good and sufficient service of the same respectively on the said company or body (7 Will 4, and 1 Vict. c. 73, s. 16. See also 8 & 9 Vict. c. 16, s. 135.) In a late case it was held that service of a writ of summons on a clerk in the office of the secretary of a corporation

aggregate, is not sufficient service on the clerk or secretary, so as to authorise a motion for a disringas, or to enter an appearance for the defendants. *Walton v. Universal Salvage Company*, 16 Mees. and W. 438; S. C. 4 Dowl. and L. 558.

ABATEMENT.

1. *Affidavit of verification* [*ante*, p. 20]—*Place of residence, not of business*.—The 3 & 4 Will. 4, c. 42, s. 8, requires that pleas in abatement for the nonjoinder of persons who ought to have been made defendants shall be accompanied by an affidavit stating the place of *residence* of such persons with convenient certainty. In a late case it was held that an affidavit verifying a plea in abatement of the nonjoinder of a co-contractor, under the 3 & 4 Will. 4, c. 42, s. 8, must state the place of *residence* of the co-contractor, and not merely his place of business. Falseness or insufficiency of the affidavit in this respect is a ground for setting aside the plea on motion. Whether affidavit does or does not state the true place of residence is a matter which may be controverted and determined by the court on motion. *Maybury v. Mudie*, 5 C. B. Rep. 283; S. C. 5 Dowl. and L. 360.

Per Maule, J.: "Upon a careful review of the cases (*Wheatley v. Golney*, 9 Dowl. 10, 19; *Lambe v. Smythe*, 15 Mees. and W. 433; *Newton v. Stewart*, 4 Dowl. and Loand. 89), we have come to the conclusion that the affidavit must state the true place of abode of the party whose nonjoinder was objected to, and that whether it does so or not is a matter that may be controverted and determined by the court on motion. Before the statute the law was that the plea must be accompanied by an affidavit stating that it was true in substance and in effect, it being a dilatory plea, and that being required in all dilatory pleas. The statute did not alter the plea, except in requiring it to state that the person was resident within the jurisdiction of the court. Now, there was nothing in the affidavit required before the act, which was not also stated in the plea. There was no allegation which might not be put in issue. But the provision of the act in question is a requisition which applies to the affidavit only. The residence must be stated in the affidavit, but need not be stated in the plea, and cannot consequently be put in issue by the replication. It would therefore be binding on the party if it could not be controverted in the manner proposed."

2. *By death of party*—*Recovering costs against executrix*.—The trial of a cause at an assizes was postponed by order of *nisi prius* on payment by the defendant of the costs of the day, "to be taxed." The defendant died before any verdict in the cause, and before the order of *nisi prius* was made a rule of court. The suit having abated (17 Car. 2, c. 8, s. 1), the court discharged a rule calling on

the defendant's executrix to show cause why the costs should not be taxed, the remedy for recovering the costs under 1 & 2 Vict. c. 110, s. 18, not being clear as against an executrix. *Hill v. Brown*, 16 Mees. and Wels. 796.

Per Parke, B.: "The order of *nisi prius* was not made a rule of this court till after the action had abated by the defendant's death. The remedy by attachment was taken away by that event. Though there may be a remedy against the defendant's personal representative, we ought not to order taxation of costs, unless we could see clearly that the plaintiff would have a remedy for recovering them under 1 & 2 Vict. c. 100, s. 18, or otherwise."

3. *Affidavit of verification—Addresses at time of plea.*—In the affidavit required to be given under the 3 & 4 Will. 4, c. 42, s. 8, in support of a plea of abatement for the non-joinder of persons as co-defendants, it is not sufficient to state the residences of such persons at the time of the commencement of the suit; but such an affidavit must give their residences at the time of the plea pleaded. *White v. Gascoyne*, 18 Law Journ., N.S., Exch. 110.

Per Parke, B.: "The objection to this affidavit is, that it says that the persons therein named resided at certain places therein mentioned at the time of the commencement of the suit; but it does not say that they resided there at the time of plea pleaded. The statute clearly requires that the residence at the time of the plea being pleaded should be stated in the affidavit."

AFFIDAVIT—JURAT.

Interlineations.—The rule of Mich. Term, 37 Geo. 3 (7 Term. Rep. 82) provides "that no affidavit be read or made use of in any matter depending in the court in the jurat of which there shall be any interlineations or erasure. It has lately been decided that the above rule excluding affidavits, in the jurats of which there are interlineations, applies to affidavits sworn in India. *Re Page*, 5 Dowl. and L. 475.

Per Wilde, C.J.: "According to the rule of the superior courts there is to be no interlineation in the jurats of affidavits. In the present case there was a want of identity without the interlineations here made. If, therefore, the rule applied to such cases, there is no doubt that this affidavit could not be used. Now, there is less probability of a mistake in affidavits sworn here than in affidavits sworn abroad. It is difficult to make distinctions where there is a regular tribunal, although the court might be led to think that there was not much chance of inaccuracy. But the affidavit might come from a place where less accuracy could be expected."

2. *Entitling misnomer of party.*—A rule *nisi* for a commission to examine witnesses was obtained upon an affidavit entitled, "H. J.,

plaintiff, and G. A. F. L. Curzon, commonly called Viscount Curzon, defendant," the title of the cause being, "H. J. v. G. A. F. L. Howe, commonly called Viscount Curzon:" Held insufficient. *Joll v. Lord Curzon*, 5 Com. Bench Rep. 205.

3. *Paper or parchment*—*Married woman's acknowledgment to bar dower*.—The court permitted an affidavit of verification of an acknowledgment by a married woman to bar her dower before commissioners, to be received by the officer of the court, although written on paper instead of parchment. *Exp. Carr*, 5 Dow. and L. 488.

Per cur.: "The object of the affidavit is to satisfy the court of the authenticity of the certificate, but, as in the present instance, the object of the acknowledgment is only to bar dower, and not to pass the fee, we do not think that it is indispensable that the affidavit of verification should be on parchment."

AMENDMENT.

1. *After writ of error*—*Form of postea*—*Return of record*.—The plaintiff carried in the roll, and gave the defendant (who had obtained the verdict) notice to complete it. The defendant's attorney, finding the roll apparently complete down to the end of the postea, merely added the usual entry of the amount of costs adjudged to the defendant. A writ of error being afterwards brought, it was objected by the plaintiff, before the court of error, that there was no entry of the return of the *nisi prius* record, whereupon the judgment was postponed, in order to give the defendant an opportunity to apply to this court to amend the record. The plaintiff having refused to consent to the amendment upon a summons at chambers, and there being ground for supposing the omission to have been the act of the plaintiff himself, the court made a rule absolute for amending the record at his expense. *Newton v. Boodle*, 56 B. 206.

2. *Writ of summons*—*Statute of limitations*—*Dates of writ of summons*.—The court refused to allow the dates of writs of summons to be altered for the purpose of preventing the plaintiff's claim from being barred by the statute of limitations. *Campbell v. Smart*, 5 C. B. 196; 5 D. and L. 335.

Mr. J. Maule, after observing that in the cases referred to as authorities for allowing an amendment (*Eccles v. Cole*, 8 Mees. and Wels. 537; S. C. 1 Dowl., N. S., 34; *Lakin v. Watson*, 2 Dowl. 633; S. C. 2 Cr. and Mees. 685; *Williams v. Williams*, 10 Mees. and Wels. 476; S. C. 2 Dowl., N. S., 509) nothing false was stated by the amendment which the court made, but that by the amendment proposed in altering the first writ the court would, in fact, be making it appear that it had issued on a day different from the true one, said: "My learned brothers agree with me that, in all the cases referred to, the statute of limitations was saved for reasons which are inapplicable to the present case."

The Uniformity of Process Act expressly requires that the true date shall be inserted in the writ; and we are asked, in the face of this, to insert a false one. What grounds are there for the court to do this? Because (it is said), if the writ be not amended, the defendants will take advantage of the statute of limitations. Now, that they should be able to do this is just what the act intended, and we are asked simply to exclude them from a defence given them by a statute, and that without their being heard."

3. *Writ of summons—adding co-executor as defendant—Statute of limitations.*—In an action against two executors the court refused, after plea, to amend the writ of summons by adding the name of another executor, although the statute of limitations had run since the commencement of the suit. *Quare*, if the amendment would have been allowed before declaration or plea. In order to save the statute of limitations, the court will amend writs of summons in all cases where an amendment could have been made under the old process. *Goodchild v. Leadham*, 1 Exch. R. 706.

Per Pollock, C.B.: "There is very great difference between adding a plaintiff who comes before the court and says he is willing to be joined, and adding a defendant who is not before the court, and over whom neither the judge at chambers nor we have any control."

See *Brown v. Fallarton*, 13 Mees. and Wels. 556; *Carr v. Shaw*, 7 Term Rep. 299.

4. *At the trial—Bill of exchange—Death of acceptor—Presenting to executor.*—The declaration, in an action by the indorsee against the drawer of a bill, contained an averment of presentation to, and non-payment of the bill by, the acceptor, and the defendant traversed such presentation. The plaintiff at the trial was allowed by the judge to amend the declaration by inserting, in lieu of such averment, a presentation of the bill for payment to the defendant, as executor of the acceptor. Held, that such amendment was properly allowed, under the 3 & 4 Will. 4, c. 42, s. 23. *Caunt v. Thompson*, 13 Jur. 495.

Per Creswell, J.: "You might have applied to the learned judge at the trial to have been allowed to traverse such fact. The statute seems to contemplate cases where, though not material to the merits, the opposite party may be prejudiced by such amendment in the conduct of his defence, and gives in such cases power to postpone the trial. Here it was not material to the merits of the case whether the bill was presented to the acceptor or to his executor; but if the amendment tended to embarrass or prejudice the defendant in his defence, the judge had power to postpone the trial."

5. Postea—Judgment-roll—Power of judge who tried the cause—Assignment of breaches in covenant—Inconsistent finding of jury.—Where the finding of the jury on two breaches of covenant is manifestly inconsistent, as appears by the *postea*, the judge who tried the case may amend the *postea* from his recollection or his notes after judgment has been entered up, and a writ of error brought and argument thereon. The plaintiff, in an action on the husbandry covenants of a lease, assigned as one breach that the defendant did not seed down a certain field at the time it was sown, whereby a certain penal rent became due for one half-year, which the defendant has not paid, &c., and assigned as a further breach the non-payment of a further half-year's penal rent in respect of the same breach of covenant. The jury found for the defendant on the first of these breaches, and for the plaintiff on the last; and the entry on the *postea* was, as to the first breach, that the defendant did seed down at the time of sowing, and, as to the last, that the defendant did not seed down. Judgment having been entered up accordingly, it was assigned for error that the issue on the last breach should have been found for the defendant. After argument in the court of error the *postea* was amended by order of the judge who tried the cause; the amendment being, as to the first breach, that the defendant did not seed down at time of sowing, and that the sum claimed in such breach as penal rent did not become due; and, as to the last breach, that the sum mentioned in such last breach did become due: Held, that the judge had power to order such amendment to be made, and that the judgment-roll was also properly amended according to the amended *postea*. *Bowers v. Nixon*, 18 Law Journ., N. S., Q. B. 41.

Per Patteson, J.: "It is very true that the judge's power over the record is at an end when the *distringas* is returned, or, at all events, when judgment is signed; but no case has been found in which any limit has been made to the power of the judge to amend the finding of the jury, as it appears on the *postea*, by his notes; and we must take it in this, as in similar cases, that the amendment has been made to make the finding of the jury correct in form and according to the facts found by them. In *Mellish v. Richardson* (7 Barn. and Cr. 819), and other cases which have been cited, no doubt was made as to the judge's power to amend the *postea*. Supposing, then, the amendment to be properly made according to the judge's notes, then it comes to the question whether the judgment can be amended, that being in reality a question whether this is a mere misprision or a matter of substance. Now, we must look to the *postea* to see what the real finding of the jury was; and if it must be taken always to have been as it is, then we find a variance between the *postea* and the judgment, and that is very like misprision. Of course, we must take it that the amendment is properly made."

ARBITRATION.

1. *Enforcing award—Particular amount not stated—Attachment.*—

Where an award does not ascertain the exact amount of money to be paid, the court will neither grant a rule for an attachment, nor a rule under the 1 & 2 Vict. c. 110, s. 18, calling upon the other party to show cause why he should not pay the money since ascertained (by the applicant) to be due under the award. *Graham v. D'Arcy*, 18 Law Journ., N. S., C. P. 61.

Per curiam : " The process of attachment is adopted when the party against whom the application is made has full notice, and there must be established at least a clear *prima facie* duty on his part to perform the act for the neglect of which an attachment is sought. There is no case where the subject-matter of the non-performance is left in any uncertainty (as where the amount to be paid may be questioned) wherein the courts have issued an attachment. * * Where an unliquidated sum is to be paid, the court cannot try that matter upon affidavits."

2. *Award—Enlarging of time for making.*—The court has power under the stat. 3 & 4 Will. 4, c. 42, s. 39, to enlarge the time for an arbitrator to make his award, where the arbitrator had power to enlarge the time, but had omitted to exercise it. *Leslie v. Richardson, Richardson v. Leslie*, 17 Law Journ., N. S., C. P. 324.

Per Coltman, J. : " It is to be observed that, in the case of a power to enlarge given by the submission, it is given to the arbitrator in his character of arbitrator, which character is not absolute and perpetual, but conditional and limited, ' if he shall make his award on or before, &c. : ' whereas the power given by the act of 3 & 4 Will. 4, c. 42, s. 39, is conferred on the court, which has perpetual existence, and is given absolutely, and not conditionally. It appears, therefore, to us, that the power may be construed so as to comprehend the case of an enlargement after the expiration of the time limited; and, as the mischief to be remedied would (as was pointed out in *Parberry v. Newnham*, 7 Mees. and W. 378; S. C. 10 Law Journ., N. S., Exch. 169) be very inadequately remedied on a narrower construction, we concur with the Court of Exchequer in thinking that the larger construction ought to be adopted."

3. *Application to set aside award—Order for security for costs, effect of—Prevents moving.*—In a cause which had been referred to arbitration by order of *nisi prius*, the arbitrator made an award in favour of the defendant, who thereupon signed judgment. The plaintiff obtained a rule to set aside the award, notice of which was served upon the defendant. The defendant afterwards, and before the argument of the plaintiff's rule, obtained a judge's order to stay all further proceedings until the plaintiff should have given security

for costs: held, that the court could not entertain the application for setting aside the award whilst this order remained in force. *Badham v. Badham*, 1 Exch. 824.

4. *Rule to pay money under an award—Validity of award doubtful—Objecting to award on application to enforce—Executed by several arbitrators at different times.*—Where on a rule *nisi* ordering the defendant to pay a sum of money due under an award, a question was raised as to the validity of the award, on the ground of its not having been executed by the arbitrators at different times, and not in the presence of each other, the court refused to decide that question on such a motion, and discharged the rule. Where a cause has been referred by a judge's order, *semble*, that a party showing cause against a rule to pay the sum awarded is confined to objections apparent upon the submission and the award, and cannot bring the pleadings before the court on affidavit for the purpose of objecting to the sufficiency of the award. *Wright v. Graham*, 18 Law Journ., N. S., Exch. 29.

Per Parke, B.: "With respect to the first point, the plaintiff ought to have moved to set aside the award. *McArthur v. Campbell* (3 Ad. and Ell. 52; S. C. 4 Law Journ., N. S., K. B. 25), is clearly in point, and shows that matter of objection not apparent on the face of the award cannot be shown for cause against a rule *nisi* for an attachment for non-performance of an award. In the present case, I think, we cannot enter into any matter but what appears on the face of the submission and the award." Afterwards, his lordship said: "The point raised is too nice to be settled on the present motion, which is, in substance, an application for an attachment. An action may be brought on the award, and then the question may be raised. With regard to the first point, as to bringing the pleadings before the court, I am inclined to think that the defendant cannot take the objection, but on that point I give no decided opinion."

NOTE.—As to execution of award where several arbitrators, see *Stalworth v. Inns*, 13 Mees. and W. 466; S. C. 14 Law Journ., N. S., Exch. 81; *White v. Sharp*, 12 Mees. and W. 712; S. C. 13 Law Journ., N. S., Exch. 215.

5. *Power and conduct of arbitrator—Stranger attending arbitration.*—An arbitrator has a general discretion as to the mode of conducting the inquiry before him. The court refused to set aside an award, on the ground that the arbitrator had declined to permit a stranger to be present for the purpose of assisting the defendant's attorney with practical hints for the conduct of the defence. *Tillam v. Copp*, 5 C. B. 211.

ARREST.

1. *Affidavit of debt varying from declaration—Exoneretur—Fo-*

reign bill of exchange.—In an affidavit under the 1 & 2 Vict. c. 110, the plaintiff stated that the defendant was indebted to him as "Indorsee of bill of exchange" (setting it out according to the ordinary forms of an affidavit to hold to bail). The declaration was on a foreign bill; held, no variance. *Phillips v. Don*, 13 Jur. 455.

Per Erle, J.: "I do not think it is any variance from the ordinary meaning of the language, when the plaintiff says the defendant is indebted to him on a bill of exchange, when he declares on a foreign bill."

2. *Affidavit of debt—Accommodation bill—Cause of action, debt, and costs paid defending action.*—An affidavit to hold a defendant to bail stated that he was indebted to the plaintiff in £337, made up of £267 16s. debt, and £69 4s. costs, recovered against and paid by the plaintiff in an action brought by the indorsee of a bill of exchange, which the plaintiff had accepted for the accommodation of the defendant at his request: held, that this was a sufficient statement of a cause of action. *Stratton v. Matthews*, 18 Law Journ., N. S., Exch. 5; S. C. 12 Jur. 924.

Per Alderson, B.: "This affidavit would have been quite sufficient if it had simply said the plaintiff accepted the bill for the defendant 'at his request,' without stating the medium by which that request was communicated. Now an affidavit of debt under the 1 & 2 Vict. c. 110, is not conclusive, and may be contradicted, so that it was open to you to show that the request here spoken of was never communicated to the party."

3. *Warrant of protection under Scotch Bankrupt Act—Discharge of party protected.*—The Scotch Bankrupt Act, 2 & 3 Vict. c. 41, s. 18, enacts, that a warrant of protection granted to a bankrupt under that act "shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland, and her Majesty's other dominions, for civil debt," &c.; "but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of arrest or imprisonment *in meditatione fugæ*, or *ad factum præstandum*, or for any criminal act." A defendant having a warrant of protection under this statute was arrested in England on a *capias* issued under the 1 & 2 Vict. c. 110, s. 3, on an affidavit that he resided in Scotland, and was about to quit England to return to that country: held, on a motion to discharge him out of custody, that a *capias* so issued was not a "warrant of arrest *in meditatione fugæ*," within that section, and that the defendant was therefore entitled to his discharge. *M'Gregor v. Fiskin*, 3 Dowl. and Lownd. 591; S. C. 17 Law Journ., N. S., Exch. 201; *Ibid.* Q. B. 186; 2 Bail Cot. Cas. 237.

4. *Duty of officer to inform defendant that he may go to a dwelling-house of his own nomination.*—By the 32nd Geo. 2, c. 28, ss. 2, 12,

a sheriff's officer having arrested a defendant upon *mesne process*, shall not carry him to any tavern or public-house, or to the house of the officer himself, or any tenant or relative of his, without the defendant's free consent; nor carry him to gaol or prison within twenty-four hours from the time of such arrest, under a penalty of £50, with treble costs; unless the defendant *refuse* to be carried in the meantime to some safe and convenient dwelling-house of his nomination or appointment, within a city, borough, corporation, or market-town, in case the defendant be there arrested, or within three miles from the place where the arrest was made, if made out of any city, borough, corporation, or market-town, the house nominated not being his own house, and being within the county, riding, division, or liberty in which the defendant was arrested. In a late case upon the above statute it was held that a sheriff's officer making an arrest must not carry the party to prison within twenty-four hours, unless such party has first been informed that he may, if he will, be carried to a safe and convenient dwelling-house of his own nomination, and has refused to nominate. And it is not a refusal, if the party without being so informed, asks if he may go to a spunging-house, and, being told that there are none, makes no further proposal, and suffers himself to be taken to one of the two prisons previously named by the officer. In an action for penalties under the statute, the declaration alleging that plaintiff was carried to Whitecross-street prison without his free and voluntary consent, although he did not refuse, &c., to which not guilty was pleaded; the evidence being that plaintiff went to prison under the circumstances above stated, and there being proof that he went there for the purpose of enabling himself to recover damages, particularly that he had told his creditor after the arrest, that if an arrangement were declined he would go to Whitecross-street prison: held, that the judge directed the jury properly on the issue joined, by desiring them to say whether plaintiff went to prison for want of being informed of his right to go to a house of his own nomination, or whether he elected, for purposes of his own, to go to prison. *Gordon v. Laurie*, 9 Q. B. 60; S. C. 11 Jur. 98.

Per Lord Denman, C. J.: "The principle that every person knows the law, or rather that his ignorance of it shall not excuse, does not apply in this case, because the statute, upon which this action is founded, contemplates an ignorance of its provisions by the party arrested, and provides for it in sect. 3, enacting that the sheriff's officer shall deliver a copy of the act to every person arrested. It is important that we should state that we adhere to those cases which decide that it is necessary for the officer to give information to the party arrested of the right conferred by the statute to name a dwelling-house to which he may be

taken. This decision may not be exactly following the words of the statute, but it is within their spirit."

See *Pitt v. Sheriff of Middlesex*, 4 Moo. and P. 726 ; S. C. 1 Dowl. 201 ; *Dewhurst v. Pearson*, 1 Cr. and Mees. 365 ; S. C. 3 Tyrwh. 242 ; *Simpson v. Renton*, 5 Barn. and Adol. 35 ; *Silk v. Humphery*, 4 Adol. and El. 959.

ATTACHMENT.

Demand of performance—Power of attorney—Non-delivery by attorney of bill of costs.—The proceeding by attachment is a quasi criminal method of enforcing obedience to a rule or order. In order to obtain the attachment, a demand of performance of the act should be made by the party himself, or by some one duly authorised by power of attorney. In a late case it appeared that a judge's order was served upon C., an attorney, calling upon him to deliver his bill of costs to B. within ten days. This order, not having been obeyed, was made a rule of court, and the rule was served upon C. by B.'s clerk, who at the same time demanded the bill of costs, but had no power of attorney to make the demand: Held, that this was insufficient to support an attachment against C. *Exp. Briggs re Catlin*, 13 Jur. 471.

ATTORNEY.

1. *Articled clerk dying—Return of premium.*—The court refused to order an attorney to repay any portion of a premium of two hundred guineas received by him with an articled clerk, who died within a month after he was articled. *Re Thompson*, 1 Exch. Rep. 864.

2. *Bill of Costs—Specifying the court.*—An attorney is bound to specify in his bill as well every court as the name of every suit in which the business charged for was done. Such bill is an entire thing ; and if the same bill blends charges for work done in a court of equity with charges for work apparently done in some court of common law, without pointing out which, the client cannot judge or be advised whether he should refer the whole bill for taxation, and that charges in the same bill for equity business, though correctly stated, cannot be recovered. *Ivimey v. Marks*, 16 Mees. and Wels. 843 ; S. C. 11 Jur. 355.

Per Pollock, C.B. : "The question in this case arises on the recent stat. 6 & 7 Vict. c. 73, whereas *Walter v. Lacy* (1 Man. and Gr. 54), which has been relied on by the plaintiff's counsel, occurred before that statute was passed, and which makes this difference in the law, that now everything in and every part of an attorney's bill may be taxed, so that the distinction no longer exists between those parts of it which are and those which are not taxable. But it is also worthy of remark that in that case the counsel for the defendant gave up the point, on the authority of *Drew v. Clifford* (R. and M. 280 ; S. C. 2 Car. and Pay. 69),

which has also been cited. The point, therefore, not having been made in *Walter v. Lacy*, even if that case had turned on the very same statute as the present, I do not know that we should consider it as an authority binding on us. Then with respect to *Drew v. Clifford* itself: all that Lord Tenterden did there was to direct the jury to find a verdict for the plaintiff, reserving leave to the defendant to move the court above on the point; but no motion was ever made. There is, however, a case of *Hill v. Humphreys* (2 Bos. and Pul. 343), which is more to the purpose. The marginal note of that case is, that if an attorney introduces into his bill certain items connected with his professional capacity, though not immediately within the words of the 2 Geo. 2, c. 23, and in an action on the bill fail, because it was not properly delivered according to the directions of the statute, he must fail altogether, and will not be allowed to recover for such items only; and the reporters then add a query whether the same rule would not prevail if such items were not at all connected with his professional capacity. [The Lord Chief Baron here read Lord Eldon's judgment in that case.] It appears to me that *Hill v. Humphreys* was very well and correctly decided, and for very good reasons. I entirely adopt the argument of the counsel for the defendant, that when an attorney's bill is delivered under this statute, the whole of it must be taxed, and if the attorney does not distinctly state in what court of common law the business was done, it is the same as no business at all. In the present case, although there is a bill as to the business done in Chancery, there is none sufficient for the purpose of getting the other items taxed, and yet it is manifest from the document sent that other business was done besides the business in Chancery. Looking, therefore, at the provisions of this statute and the facts before the court, I am of opinion that this attorney has not delivered a bill of his business done, such as another attorney could fairly advise the client upon; and, consequently, he cannot succeed in this action."

3. *Delivery of bill of costs—Registered company—Office of business.*—By the 6 & 7 Vict. c. 73, s. 37, an attorney must, one month before commencing an action for his bill, deliver a bill unto the party to be charged therewith, or send same by the post to, or leave it for, him at his counting-house, *office of business*, dwelling-house, or last known place of abode. This provision was intended to relieve attorneys from several difficulties to which they were previously subjected in the delivery of their bills of costs, by giving them the option of delivering it either at the place of abode or office of business of the client. In a late case the above provision was much considered with reference to a delivery of a bill to a company. There it appeared that a railway company was formed in

August, 1845, and the defendant became a member of the provisional committee in October. The company took offices in No. 43, M—— Street, and put up a plate with their name on it. On the 5th of January, 1846, the deposits not being paid, the project was abandoned. The defendant was not shown to have been at the offices after that date. In September, 1846, the plaintiff, who had been employed as an attorney by the committee, delivered a signed bill, charging the committee, at the offices in M—— Street, where the brass plate still remained: Held, by Wilde, C. J. and Williams, J. that there was no evidence for the jury that the plaintiff's bill had been "left for the defendant at his office of business," under the 6 & 7 Vict. c. 73, s. 37; and by Coltman, J. and Maule, J., that there was sufficient evidence. *Blandy v. Deburgh*, 18 Law Journ., N. S., C. P. 2.

Per Maule, J.: "They could not abandon that which was the most important business of those who dealt with them, namely, that of paying. It was, therefore, as necessary for them to have a place of business to pay their debts as to receive their deposits; and it was due to the company to presume that until the debts were paid, their place of business continued, although the scheme had been abortive. There is, therefore, I think, very good ground for saying that the place at which this bill was delivered, was the place of business of the provisional committee, at the time it was so delivered. Had the plaintiff delivered the bill, as suggested, at the defendant's place of abode, he must have elected at the time which of the provisional committee he intended to sue. But he was not bound so to elect; he had a right to charge all or any of the members of the provisional committee, and, for the purpose of being able to serve all, he might very well send the bill to what was known to be the place of business of the provisional committee. With respect to what had been said about the defendant not having had any opportunity of knowing that he was sought to be charged with the bill, that was his own fault. He must have known that there were demands against the company, and if he wanted to know what these demands were, he should have gone to the place in Moorgate-street, where he might have ascertained the particulars."

Per Williams, J.: "I am of opinion that the service of this bill, at the house in Moorgate-street, is not a delivery at the defendant's office of business, within the meaning of the Attorney's Act, 6 & 7 Vict. c. 73. The term "office of business" means a place where a person actually carries on business, either by himself or agent. But I do not think that the defendant can be considered to have been carrying on business at this place at the time the bill was left. The business of the company had then come to an end, and,

although it was true the defendant's liability had not ceased, yet the place in Moorgate-street had ceased to be his place of business. He did not concur in making it a place of business, for the purpose of winding up the concerns of the company; nor did it appear that he had given any authority for that being done."

4. *Retainer of attorney by town council—Payment of law expenses out of borough fund.*—Where a town council had removed a town clerk from his office by resolution, for misconduct, and refused his claim of compensation: Held, that the costs of an attorney employed in opposing a mandamus to assess compensation were properly chargeable to the borough fund, under stat. 5 & 6 Will. 4, c. 76, s. 92, although the jury found the issues ultimately raised on the mandamus for the late town clerk, it not being shown that the town council acted otherwise than *bona fide* in the removal. The attorney having been retained generally by a resolution of the town council, and having also been authorized and retained by resolution of the town council to take proceedings in opposition to the rule *nisi* for the mandamus: Held, that this was a sufficient retainer to warrant the payment to him of the costs of defending the issues, and that it was no objection to the order for payment made in consequence that it was an order for payment on account, the attorney not having delivered a bill, and it not appearing that the sum ordered to be paid exceeded the sum due to the attorney. *Reg. v. Town Council of Lichfield*, 10 Q. B. 534; S. C. 11 Jur. 868; 16 Law Journ., N. S., Q. B., 333.

5. *Retainer—Churchwardens and overseers—Joint retainer.*—An order of removal made from the parish of C. to that of L. having been confirmed by an order of justices in quarter sessions upon a preliminary objection, a rule *nisi* was obtained for a mandamus to the justices to enter continuances and hear the appeal. A copy of the rule was served on two of the defendants, R. D. and R. T., who then were churchwardens of C. R. T., afterwards, in conjunction with the then overseers of C., signed a retainer to the plaintiff to act as their attorney in the matter of the mandamus, but countermanded it before anything was done by the plaintiff. R. D. did not interfere. Before the rule was argued J. D. and W. E., the other defendants, were elected overseers, and R. D. and R. T. re-elected churchwardens. The plaintiff's clerk saw J. D. repeatedly about the rule, who asked how the matter was going on; he also repeatedly saw W. E., the other defendant, who was not so active. The plaintiff having delivered his bill of costs to one of them, they all expressed their readiness to pay, but said there was a grudge in the parish: Held, that the defendants were not jointly liable. *Marsh v. Davies*, 1 Exch. R. 668; S. C. 17 Law Journ., N. S., Exch. 94.

Per Parke, B.: "If there was no contract at all, and the plain-

aff looked to the funds of the parish for repayment, it follows that he cannot sue anybody. If the retainer is looked at, it appears that one party is not bound, as he disclaimed his retainer; and there is no evidence whatever of his having revoked that disclaimer." *Per* Pollock, C. B.: "In this case there is an action against four persons, against one of whom there never was any beginning."

6. *Uncertificated attorney suing for fees.*—The 26th sect. of the 6 & 7 Vict. c. 73, disables an attorney who is uncertificated only from suing for fees, rewards, or disbursements for any business, matter or thing done by him as an attorney or solicitor in some suit or proceeding in one of the courts mentioned in the act, and not for business done which had no reference to such suits or proceedings. *Richards v. Lord Suffield*, 17 Law Journ., N. S., Exch. 362; S. C. 12 Jur. 731.

Per Parke, B.: "It appears to us that the words of reference in s. 26, as an attorney or solicitor, as aforesaid, confine the disability to the same class of fees, rewards, and disbursements, as those pointed out expressly in the 35th and 36th sections. This being so, the plea is in our opinion defective, in not averring that fees, &c., were due to the plaintiff as an attorney in prosecuting or defending a suit or proceeding in a court; they are not even stated to be due to him as an attorney at law, and they might be payable to him as an attorney acting before arbitrators, or a compensation jury, or transacting business under a power of attorney for the defendant."

BAIL.

Deposit in lieu of bail—Taking it out of court—Time for applying.
—Where a party arrested upon a capias issued by judge's order under sect. 3 of stat. 1 & 2 Vict. c. 110, had paid money into court, an application to take it out on perfecting special bail must be made before issue joined, in pursuance of sect. 8 of stat. 7 & 8 Geo. 4, c. 71. *Welchman, Administratrix, &c., v. Sturgis*, 13 Jur. 386.

Per Patteson, J.: "The stat. 1 & 2 Vict., c. 110, has made no difference. It is true that putting in bail is collateral to the actions, but the change of money into bail is equally collateral. It is only by stat. 7 & 8 Geo. 4, c. 71, that a party can now pay money into court, in lieu of bail, stat. 1 & 2 Vict., c. 110, having preserved the right as far as it is applicable. If the defendant wants to have the money paid out of court, he must do it under the terms of the former, and, therefore, there is no difference since the last statute."

BILL OF EXCEPTIONS.

Pleading that no record, and bill not signed, &c.—Plea in error.—Where defendants in error severed in pleadings, and pleaded, in

addition to the joinder in error, respectively that there was no record of the bill of exceptions, that the Chief Justice did not seal the bill of exceptions, and that he did not acknowledge his seal, the court, on motion, ordered the respective pleas pleaded by each, except the joinder in error, to be struck out with costs. *Fishmongers' Company v. Robertson*, 18 Law Journ., N. S., C. P. 55.

Per Parke, B.: "Have you any authority for a plea of *nil tiel* record to a bill of exceptions? The very record is before us. It is quite clear that error in law, and error in fact, cannot be pleaded together. The rule must be absolute to strike out these new-fangled pleas with costs."

2. *Time at which they should be delivered to the judge—Form of record.*—Where objections are taken to the judge's charge, and overruled, and the judge gave time to have the exceptions reduced to writing, and the document was not tendered until after the jury were discharged: Held, that the court could not hear these exceptions, as it did not appear from the record whether they were taken before the jury were discharged. *Close v. Batt*, 1 Irish Jur. 256.

COSTS.

Paying money into court—Judgment of nonsuit.—The plaintiff is not entitled to costs up to the time of the defendant paying money into court, after the defendant has obtained judgment, as in the case of a nonsuit. *M'Lean v. Phillips*, 13 Jur. 411.

Per Williams, J.: "At common law neither party is entitled to costs. What statute does the plaintiff rely on? for he has not entitled himself to tax his costs under the rule of *Trinity Term*, 1 Vict." *Per Cresswell, J.*: "The plea of payment into court gives the plaintiff a conditional title to costs; but, if he does not comply with the condition, is he within the rule? If he had been nonsuited at *nisi prius*, he would not have been entitled to costs. It is difficult to see how his present position is to be distinguished from that."

2. *Review of taxation where Master misled by false affidavits—Payments not made.*—The Master having, upon the taxation of the plaintiff's costs, been induced by false affidavits to allow a large sum, as the fees and expenses to commissioners named in a commission for the examination of witnesses, which sum, it was suggested, had not been paid, the court referred it back to the Master to inquire, by such means as he should think fit, what sums had actually been paid, and to review the taxation if necessary. *Barnes v. Attwood*, 5 C. B. 164.

Per Wilde, C. J.: "It is well-known that upon every taxation of costs the Master requires a positive affidavit that the several sums which are represented to have been paid, have really been paid. If he were, in the first instance, to go into any more minute inquiry, great expense and great delay would necessarily

be entailed upon the parties. He must, therefore, dealing with the materials which are before him, be content to act upon the positive affidavit. * * * The ground of the present motion is that the payments so alleged, and so sworn to have been made, were in fact never made. [The payment was by a cheque which was not to be presented till after taxation, and then only for what was allowed, after an allowance to the attorney of a portion.] * * * The Master never had an opportunity of exercising his judgment on the payments now set up: the matter must, therefore, go back to him."

3. *Arrest of judgment—Several issues.*—A declaration in *assumpsit* contained two special counts, a count for work and labour, and a count upon an account stated. Pleas, first, as to the whole, non-*assumpsit*; second, a plea of justification to the first count; third, a plea of justification to the second count; fourth, to the fourth count, payment. Verdict on the plea of non-*assumpsit*, for so much as related to the first, third, and fourth counts for the defendant, and upon the special pleas and non-*assumpsit* to the second count, for the plaintiff. Judgment was arrested on the second count: Held, that the Master was right in allowing the defendant the general costs of the cause, for a defendant is entitled to costs under 23 Hen. 8, c. 15, though he may not have the verdict in his favour on every part of the record, and, in disallowing the plaintiff the costs of witnesses called by him in support of the issue on which he was successful, but which witnesses were not exclusively applicable to it. *Elderton v. Emmens*, 5 D. and L. 489; S. C. 12 Jur. 728; 17 Law Journ., N. S., C. P. 277.

Wilde, C. J., after observing that it had been contended that the right of the defendant to costs depended upon the 23 Hen. 8, c. 15, extended to all actions by 4 Jac. 1, c. 3, and that that statute did not entitle the defendant to costs, unless the verdict was in his favour on the whole record (which it was not in this case), said: "The case of *James v. Brook* (16 Law Journ., N. S., Q. B. 166) is certainly expressly in point, and if that was rightly decided, this rule should be made absolute. But, after mature consideration, it appears to us that the 23 Hen. 8., c. 15, as it has been construed in several cases applies, although the defendant cannot have the verdict in his favour on every part of the record (see *Day v. Hanks*, 3 Term Rep. 654; *Thornton v. Williams*, 13 East, 191; *Cross v. Johnson*, 9 Barn. and Cres. 613). The attention of Mr. Just. Erle does not appear to have been drawn to these cases by the counsel who argued in *James v. Brook*. It was assumed that the stat. 23 Hen. 8, c. 15, did not give the defendant costs in such a case, and the question is treated as depending on the new rules as to the allowance of costs on particular issues found for the plaintiff or defendant; but we think that statute

does apply to this case, which differs from these only in circumstances. With respect to the second count, the plaintiff obtained a verdict, and judgment was arrested; but it seems difficult to say on what principle a plaintiff is to be in a better situation when he has obtained a verdict on an issue joined on a count so defective that he could have no judgment, and when he has a judgment by default on a good count as in *Day v. Hanks*. As far as costs are concerned, the count on which judgment is arrested is moved out of the way; there is no effective verdict when judgment is arrested, and, although it may be true the defendant cannot have judgment on every part of the record, yet, on the whole record, the judgment is in his favour, and we think the Master was right in allowing him the general costs of the cause. As to the issues found for the plaintiff, the Master would not allow him the costs of witnesses, because they were not exclusively applicable to those issues, but also to others which were found against him: the Master is the proper party to judge whether the evidence of witnesses were exclusively applicable to issues found for the plaintiff, and, as he has decided that it was not, the plaintiff not being entitled to the general costs of the cause, was not entitled to have such costs allowed to him" (see the several cases of *Larnder v. Dick*, 2 C. and M. 382; *Knight v. Woore*, 3 Bing. N. S. 534; and *Crowther v. Elwell*, 4 Mee. and W. 51).

4. *Payment to witnesses before taxation—Formd pauperis—Costs of proving documents, certificate of proof—Costs of several issues.*—The rule requiring the payment of costs of the attendance of witnesses, previous to taxation, applies to a plaintiff suing in *formd pauperis*. Where the costs of proving documents are ordered to be paid, under a judge's order, by the party refusing to admit, he will not be entitled to them, unless the judge grant a certificate that they were proved to his satisfaction under Reg. Gen., H. T., 4 Will. 4, r. 20. Where, on the trial, therefore, the counsel of the party refusing admitted the documents, in consequence of which no proof was given, and the judge did not certify: Held, that the Master was right in refusing to allow the costs of the witnesses subpoenaed to prove such documents. Where the plaintiff succeeded on the issue of never indebted, and the defendant on that joined on the plea of set-off: Held, that the plaintiff was not entitled to the costs of a witness whose evidence was necessary for the proof of the latter as well as the former issue. *Freeman, a pauper, v. Roeder*, 13 Jur. 427.

Per Erie, J: "A review of taxation was moved for, on the ground that the claim for expenses of two witnesses was disallowed, by reason of their not having been paid to them before taxation; and it was contended that the rule requiring such previous payment ought to be relaxed in favour of pauper plaintiffs, who are unable to make the advance. But it appears to me that this

ground is insufficient : the law requires such previous payment to prevent the witnesses being defrauded by the attorney. In the taxation of costs in a pauper cause, the attorney alone is immediately interested ; and, as the privileges intended for the benefit of the poor have, according to experience, been used by some attorneys as instruments of extortion, the precautions against fraud should not be relaxed in favour of the attorneys for paupers. A second ground for a review was, that the expense of witnesses to prove documents had been disallowed where a judge's order for the costs of proof of such documents had been made, and the proof was not given to the trial, in consequence of admissions made by the defendant's counsel rendering it unnecessary. But such costs are due only in case of the judge at the trial certifying that the proof was to his satisfaction ; and, as there was no certificate, I think they were properly disallowed. A third ground was, that one of the witnesses to these documents was also a witness upon the issue found for the plaintiff ; but, inasmuch as the plaintiff failed in the action, and succeeded only on one issue, which did not entitle him to the general costs of the cause, he has no right to the costs of a witness, applicable both to the issue on which he succeeded, and to an issue on which he failed."

5. *Less than forty shillings recovered*—*Certificate under 43 Eliz. c. 6, s. 2*—*Payment into court*.—By 43 Eliz. c. 6, s. 2, it is enacted, " that if upon any action personal to be brought in any of her Majesty's courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court, shall not amount to the sum of *forty shillings* or above, that in every such case the judges and justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions." This statute still remains in force except as to actions of trespass and trespass on the case (see 3 & 4 Will. 4, c. 24). In a late case, which was an action for several breaches of covenant, the defendant paid £10 into court in respect of one breach, and the plaintiff had a verdict for 1s., in respect of two other breaches : Held, that this was not a case in which the judge could certify under the 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs. The true test by which to determine whether a case is within the statute of Elizabeth is whether the debt or damages for which the court can see that the action was brought do not amount to more than 40s. *Richards v. Black*, 18 Law Journ., N. S., C. P. 17 ; S. C. 12 Jur. 1077.

Per Coltman, J.: "I am of opinion that this is not a case within the statute of Elizabeth, the object of which was to avoid trifling and frivolous suits, over which inferior courts had jurisdiction, being brought in the superior courts. To ascertain whether an action is within the evil intended to be remedied by the statute of Elizabeth, the test is, the amount for which the court can see that the action is brought. The question will be whether the court can see that the debt or damages to be recovered in this action did not amount to the sum of 40s. Here, it appears upon the record that the plaintiff was entitled to recover £10 in addition to the 1s. for which the jury found their verdict."

6. *Where several issues — Witnesses.* — To a declaration containing three common counts, the defendant pleaded the general issue, and two special pleas. Each plea was directed to the whole declaration. The plaintiff had a verdict as to part of his demand on the first issue, and the defendant as to the residue. The second issue was found for the plaintiff, and the third for the defendant: Held, that, as the defendant was entitled to the *postea* and the general costs, he was entitled to the costs of all witnesses attending to prove the third issue, whether their evidence applied to any other issue or not, and that he was also entitled to the costs of those who appeared to reduce the plaintiff's demand on the first issue, unless they attended to negative the second; that the plaintiff was entitled to the costs of the witnesses who appeared solely to prove the issues found for him under the first issue, and also the second issue, both or either of them. *Welby v. Brown*, 1 Exch. 770.

DECLARATION.

1. *In debt — Form of declaration — Queritur.* — A declaration commencing in the ordinary form of an action of debt, and concluding thus, "yet the defendant hath disregarded his promises, and hath not paid any of the said monies, or any part of them." Held bad on special demurrer, it being doubtful whether it was a declaration in debt or *assumpsit*. The *queritur* in the commencement of a declaration in debt is not material, and therefore the sum claimed in it not covering the sum claimed in the counts, is not a good ground of special demurrer. *Bennett v. Sandheim*, 1 Irish Jur. 215.

Per Pigot, C. B.: "We are all of opinion that this declaration is vicious upon one of the grounds assigned as a special cause of demurrer, and noted for argument, namely, that it is doubtful whether the declaration is framed in debt or *assumpsit*. If this were a mere departure from the ordinary form of pleading—not such a one as would be calculated to mislead the pleader—the court would endeavour to make an intendment to uphold the pleading; but coupling the commencement of this declaration with the part preceding the laying of the damages, it is evident

that it is likely to mislead the pleader, and leave him in doubt as to the frame of his defence. *Lord v. Houston* (11 East, 62) is an authority that the 'render' in the commencement is superfluous, and may be omitted. If so, the rest constitutes a good declaration in assumpsit; but the argument of the plaintiff is, that the promise may be struck out from the conclusion, and thus it may be treated as a count in debt. Now this is the very thing which constitutes the ambiguity, and makes the pleading vicious. In the case of *Clowes v. Williams* (3 Bing. N. C., 868) no doubt could exist as to what was the nature of the count. In *Compton v. Taylor* (4 Mees. and W. 138) the demurrer was taken for misjoinder, and the point raised here was not argued, the demurrer taken having been too large. If a great difficulty did not exist here, I would not be disposed to allow the demurrer; but as it is, we are of opinion that the declaration is vicious."

2. *Time for declaring—Declaring after cause out of court—Setting aside declaration.*—By Reg. Gen. of Hilary Term, 2 Will. 4, pl. 35, "a plaintiff shall be deemed out of court, unless he declare within one year after the process is returnable." A defendant having on the 11th of August served a summons on the plaintiff to show cause why the declaration should not be set aside on the ground as stated in the summons, of 'four terms' (instead of 'a year') having elapsed between the writ and declaration. The judge on the 14th of August, dismissed the summons for this defect. The defendant having, on the 22nd of October, applied to another learned judge, who refused to interfere, obtained a similar rule in this court in Michaelmas Term: Held, that the judge was right in dismissing the summons, and that the defendant was too late in his application to court. *Chaplin v. Showler*, 18 Law Journ., N. S., Exch. 34.

3. *Indebitatus assumpsit—Common counts forming one count.*—Where, in *indebitatus assumpsit*, the plaintiff by his declaration claims one sum in respect of work and labour, money paid and money had and received, the whole forms only one count. Where, therefore, the latter part of the declaration was bad for not alleging that the money was paid, &c., at the request of the defendant: Held, (after a general verdict for the plaintiff), that the defect in the declaration was no ground for arresting the judgment. *M'Gregor v. Graves*, 18 Law Journ., N. S., Exch. 109.

Per Parke, B: "It is quite clear that the declaration, in the present case, consists of one count only. That was settled by this court in *Morse v. James* (11 Mees. and W. 831; S. C. 12 Law Journ., N. S., Exch. 416). Such being the case and the money paid, and the money had and received, being only part of a count, we are bound to infer that the jury gave their verdict on that part of the declaration which is good in point of law. *Doe*

dem. Laurie v. Dyeball, 8 Barn. and Cres. 70; S. C. 6 Law Journ., N. S., K. B. 317."

4. *Variance from writ—Setting aside—Counts in debt and assumpsit.*—Where a declaration or other pleading is susceptible of a construction that will make it good, it is not competent to the party pleading it to insist upon a construction that will make it bad. The writ being in debt, and the declaration containing two counts, the one commencing as a count in debt, but concluding with a promise and a breach, and the other being a count in assumpsit, the court set aside the declaration for this variance from the process. *Moore v. Forster*, 5 C. B. 220; S. C. 5 D. and L. 352; 17 Law Journ., N. S., C. P. 101.

Per Wilde, C. J.: "The process in this case was clearly in debt, and the declaration in its commencement professes to follow the writ. The first count may be a good one in assumpsit, and the second is a count in assumpsit. Consequently there is a sufficient declaration in assumpsit. This shows that there is a variance between the process and the declaration, and the proceeding is therefore irregular."

EJECTMENT.—[ante, pp. 7, 26—29].

1. *Affidavit under 4 Geo. 2, c. 28, that no distress—Judgment superseded by party signing it.*—By the 4 Geo. 2, c. 28, s. 2, in cases where there are six months' rent in arrear, and no sufficient distress on the premises, the affidavit in moving for judgment should state that half-a-years' rent was in arrear before the declaration was served; that the lessor of the plaintiff had a right to re-enter; that no sufficient distress was to be found on the premises, countervailing the arrears of rent then due; that the premises were untenanted, or that the tenant could not be legally served with the declaration (as the case is), and that a copy of the declaration was affixed on the most notorious (stating what) part of the premises. (7 Bacon's Abr. 37; 1 Harr. N. P. 121; Princ. Com. Law, 19. See ante, p. 7, where the rest of the section is set out, but it is stated by mistake to be sect. 8, instead of sect. 2). *Quære*, whether, upon a motion for judgment against the casual ejector under the above statute, an affidavit, stating that an amount exceeding half-a-years' rent was in arrear, and that there was "no sufficient distress to be found upon the premises countervailing the said arrears of rent then due" is sufficient; or whether the affidavit should state that the property upon the premises was insufficient to countervail half-a-years' rent. Where judgment had been obtained upon an affidavit which the party was apprehensive might be held to be defective in this respect, the court allowed the judgment to be superseded, and another judgment to be signed, upon an amended affidavit. *Semble*, that no special ground for setting aside the first

judgment was necessary. *Doe dem. Gretton v. Roe*, 4 Com. Bench Rep. 576.

See *D. d. Powell v. Roe*, 9 Dowl. 548, and quote its correctness.

2. *Lease renewable—Demand of possession—New trial, new evidence being discovered.*—Upon the expiration of a lease for lives which contained the following covenant:—"That the lessor, his heirs, or assigns, upon the death or demise of the before named four lives, or *cestui que vies*, should and would add and insert to the time or term of that demise, the natural life of such person as should be nominated by the said lessee, his heirs and assigns, in the place and stead of the said four lives, during which the said estate should be continued in consideration that the said lessee, his heirs or assigns, should lay out and expend in building a dwelling-house upon the said premises, the sum of £200, within the period of four years next ensuing," an ejectment was brought, and the judge directed a verdict for the plaintiff. No evidence of the fulfilment of the condition having been given, and no demand of possession proved, subsequently to the trial, evidence of a substituted contract which was performed was discovered. Held, that a new trial should be granted, for the purpose of submitting the new evidence to the jury. Held, also, that if the original contract, or the substituted one, were performed by the defendant, the lessor of the plaintiff could not sustain the ejectment without a demand of possession. *Doe dem. Baker v. Harte*, 1 Irish Jur. 247.

Per Pigot, C. B.: "We are of opinion that the rule laid down—in the cases cited by the defendant's counsel—(a) is a correct one, in proceeding against a lessee for lives, after the expiration of a lease, and where there is a covenant for renewal, as here. Where there is a distinct contract, unannulled by any misconduct on the part of the tenant, and no condition unperformed, then on the dropping of the life the tenure is referable to the contract, and a demand of possession becomes necessary. We are likewise of opinion that if there be a contract, the terms of which are unperformed, the tenant cannot be held to continue in possession under the contract, and, therefore, a demand of possession is unnecessary. In this view we are of opinion that a demand of possession is necessary, if the jury are satisfied that the condition was fulfilled. Now, if the instrument bearing date in 1830 be genuine, and, as recited, another condition (which has been fulfilled) was substituted for the original one, the defendant would be entitled to have the verdict entered for him. (a). *Walker v. Byre*, 3 Ir. Law. Rec. N. S. 68; *Doe dem. Newby v. Jackson*, 1 Barn. and Cresk. 448; *Doe v. Newcomen*, 1 Jan. Ex. Rep. 496."

8. *Notice to appear without date.*—A party is entitled to a rule for judgment against the casual ejector, where the notice to appear is

properly served, although it bears no date. *Doe dem. Woodhouse v. Roe*, 18 Law Journ., N. S. Exch. 73.

Per Parke, B.: "The cases of *Doe dem. Green v. Rowe* (8 Scott, 385), and *Doe dem. Woodroffe v. Roe* (5 Scott, N. R. 800) support the application. There is also a case in this court to the same effect [supposed to be *Doe dem. Gyde v. Roe*, 15 Law Journ., N. S., Exch. 8]. The weight of authorities is in favour of the application."

4. *Service of declaration—Explanation—Service prior to first day of term.*—To a rule calling on the tenant in possession to show cause why service of the declaration and notice in ejectment on his daughter, on the premises, should not be deemed good service, it is no answer that the notice was not read over or explained to the party served, and that the service took place at ten o'clock of the night preceding the first day of the term, unless it is sworn that the tenant was not acquainted with the nature and meaning of the proceedings before the first day of the term. *Doe dem. Kenrick v. Roe*, 5 D. and L. 578; S. C., 2 Bail Court Rep. 250.

Per Coleridge, J.: "It is of course desirable that parties should be held to strict service in cases of ejectment, but I can see good reason why the service in this case should be held sufficient, by treating it as if it were service of a writ of summons in an ordinary action. There, it is necessary to show that it came to the knowledge of the party. Here, the declaration and notice were received in time; but the tenant relies on the fact that they were not explained or read over to the daughter on whom they were served, and therefore, that he may not have been acquainted with the nature of the proceedings before the first day of term. As he has had the opportunity of speaking to that fact, and it is one peculiarly within his own knowledge, and he has not thought fit to do so, I am of opinion the case comes within the principle acted upon in *D. d. Downes v. Roe* (4 Dowl. 565").

5. *Undertaking in consent rule is personal only—Rule of court for payment of money, effect of judgment.*—The undertakings contained in the common consent rule are personal, and binding only to the extent of creating a liability to attachment. They cannot be enforced by the representatives of a deceased party. In cases in which a rule of court for the payment of money has the effect of a judgment under 1 Vict. c. 110, s. 18, a rule *nisi*, calling upon the parties to show cause why the amount should not be paid, is unnecessary. *Doe dem. Harrison v. Hampson*, 4 Com. Bench Rep. 745; S. C. 17 Law Journ., N. S., C. P. 147.

Per Wilde, C. J.: "It has repeatedly been held that the liability to pay costs under the consent rule in ejectment is merely personal, to be enforced by attachment only, and that it

dies with the party. It was so held in *Thrustout v. Bedwell* (2 Wilson; 7), *Doe v. Ford* (2 J. P. Smith, 407), and *Doe dem. Pain v. Grundy* (1 Barn. and Cres. 284); and the rule is so stated in the several text books to which reference has been made (Roscoe's *RI. Act.* 607; Adams's *Ejectm.* 335, 3rd edit., 280, 4th edit.; 2 Will. Saund. 720, n. n.; 2 Will. Exors. 1575, 3rd edit.; Fidd's *Pract.* 1243, 9th edit.). The only authority opposed to this is *Goodright v. Holton* (Barnes, 119). We have caused search to be made, and we find that that case is not quite as stated in the report. * * * Assuming that the consent rule has the force of a judgment, then, according to the 8 Mees. and W. 349), *Doe v. Amey* (8 Mees. and W. 565), *Neale v. Portlethwaite* (1 Q. B. Rep. 243), and *Hodgson v. Paterson* (4 Man. and Gran. 333; S. C. 5 Scott N. R. 76), the motion is unnecessary. And if it has not the force of a judgment, we are equally without power to do that which is prayed."

EXECUTION.

Discharge from ca. sa. where plaintiff dead.—In June, 1828, a defendant was taken in execution upon a *ca. sa.*, and in April, 1836, the plaintiff died. The court refused to discharge the defendant out of custody upon his affidavit that he had been informed and believed that no legal personal representative had revived the action, or had taken any proceedings whatever since the death of the plaintiff. *Taylor v. Burgess*, 16 M. and W. 781; S. C. 4 Dowl. and L. 701.

Per Pollock, C. B.: "Your objection is that there is no person who can give a legal discharge on payment of the debt, but that is not sufficiently made out." *Et per Parke, B.*: "There is no ground laid for the interference of the court. Still, if the defendant is prepared to pay the money into court, there will be no difficulty in getting out of custody."

See Broughton v. Martin, 1 Bos. and Pull. 176; *Parkinson v. Horlock*, 2 New Rep. 240; *Gore v. Wright*, 1 Dowl., N. S., 864.

INTERPLEADER.

Sheriff—1 & 2 Will. 4, c. 58, ss. 3 and 4—*Barring claim*—*Sufficiency of affidavit*—*Claimant abroad*.—An affidavit from the claimant himself is not necessary to entitle him to call upon the judge to make an order for a feigned issue, under the 1 & 2 Will. 4, c. 58, s. 3. The sheriff having seized goods under a *fi. fa.*, received notice that they were the goods of W. On summons for an interpleader order before a judge at chambers, W.'s attorney appeared, and made an affidavit that W. was abroad, and unable to appear himself, or to make a formal affidavit, and that the deponent believed, from documents in deponent's possession, that the goods belonged to W. The judge, thinking this affidavit insufficient, made an order, under

the 1 & 2 Will. 4, c. 58, s. 3, to bar the claimant. The court (*dissentiente*, Williams, J.) held that the affidavit was sufficient, and made absolute a rule to set aside the judge's order. *Sensible, per Maule, J.*, that the Interpleader act does not require the statement of the nature and particulars of the claim to be by affidavit. *Webster v. Delafeld*, 13 Jur. 633.

Per Wilde, C.J.: "Under the peculiar circumstances of this case, and without intending to establish a precedent, I think this rule for setting aside the order of my brother Coltman should be made absolute. It appears that the claimant was residing in a foreign country, and not able to appear before the judge at chambers; an attorney, therefore, appeared for him to maintain the claim, and proposed to make use of a statement made by the claimant in support of it, the latter being in such a position that he was unable to make a formal affidavit. The admission of this statement was objected to on a technical ground—that it was not in such a form that it could be read. The attorney, then, stating that he has certain documents in his possession, as also other grounds for his belief, swears that, to the best of his belief, the goods are the property of the claimant. I think it does not lie in the mouth of the party who made the objection to say that Rickards's affidavit is insufficient. It may be that, under the circumstances, no better materials could be obtained to lay before the court; possibly it might be the utmost information that could be given. Looking, therefore, to the facts of the case and the position of the claimant, I think the attorney's affidavit ought to have been deemed sufficient, without one from the claimant himself, to entitle the latter to what he sought. The rule, therefore, should be absolute to set aside the order of Coltman, J., and an issue should be drawn up to try the right between the parties." *Per Williams, J.*: "I am sorry to say that I have the misfortune to differ from the rest of the court, and it seems to me that we ought not to rescind the order of my brother Coltman, it being a conclusion of his mind upon a matter of fact. If I were satisfied that he proceeded on the ground that the claimant himself had made no affidavit, I should concur that his decision was erroneous; for I agree with the rest of the court in thinking that the claim need not be supported by the affidavit of the claimant himself. But, it seems to me, the true ground upon which the learned judge proceeded was, that the claim was not sufficiently stated, in compliance with the statute. I forbear from any decided expression of my opinion as to whether an affidavit is necessary; it is a point which would require further consideration. But the inclination of my opinion is in accordance

with that of my brother Cresswell, that the statute requires an affidavit—that is, that the claim is to be sufficiently stated on affidavit, not that the statute requires a statement of a sufficient claim. It seems to me that it is for the judge to decide whether the claim is sufficiently stated, and if he has decided that it is stated insufficiently, there is no reason for saying that he has decided wrongly (13 Jur. 637, 638).

NONSUIT, JUDGMENT [*ante*, pp. 12, 32].

1. *Drawing up rule*—(*Ante*, p. 32).—By rule of Easter Term, 12 Vict. 1849, it is ordered that where a rule for judgment, as in case of a nonsuit, shall have been discharged on a peremptory undertaking to try at the next or any future assizes or sittings, if the plaintiff shall make default in proceeding to trial pursuant to his undertaking, the defendant shall be at liberty, if the plaintiff has not drawn up the rule, to draw it up at any time before moving for judgment, and thereupon to move for judgment without serving a copy of the rule on the plaintiff.

2. *Writ of trial—Remanet—Fresh notice of trial—Altering return-day of writ of trial—Judgment as in the case of a nonsuit*.—Where a cause is set down for trial before the under-sheriff, which, owing to the course of business, does not come on, no fresh notice of trial is necessary, the cause going over to the next sitting as a remanet. If the plaintiff neglect to alter the return-day of the writ of trial when such alteration is requisite, and the cause is not tried, he is guilty of default, and the defendant is entitled to move for judgment as in case of nonsuit. *Crockford v. Tucker*, 13 Jur. 514.

Per Erle, J.: "It is not a question of fact—it is simply a matter of practice, whether the sittings at the sheriff's court are analogous to the sittings in this court. According to the practice, as I understand from the Masters, notice of trial for one sitting before the sheriff is good notice for the next sitting, if, by the course of business, the cause is not reached. The entry, in the first instance, of the writ is an entry for trial, and if the cause is not called on the writ may be again entered without additional expense, although it may be necessary to alter the return-day, for which purpose the plaintiff's attorney can obtain the writ, and make the alteration, as a matter of course, when the under-sheriff again receives it. The notice is still good; therefore, by analogy, it comes within the rule applicable to causes entered for trial in London and Middlesex, where, if, after a cause has been made a remanet, the plaintiff withdraws his record, he is in default. In this case the plaintiff has neglected to try his cause, and the defendant was entitled to make this application. I think, under the circumstances,

however, the rule ought to be discharged, on a peremptory undertaking."

PARTICULARS.

Admissions in particulars of payment—Giving credit.—In the case of *Smethurst v. Taylor* (12 Mees. and W. 545), Lord Abinger says: "I take it to be clear that if a plaintiff in his particulars admits the payment of a certain sum, he may explain it by showing that it was applicable to an item which otherwise he could not recover." This has been followed in a late case, which was an action for use and occupation, to recover £12 8s. 10d., the balance of an account of £64 0s. 10d., the plaintiff in her bill of particulars admitted to have received £21 12s. It appeared that the defendant had taken the premises from the husband of the plaintiff, and continued in possession for some time after his death: Held that the plaintiff was not concluded from showing that a portion of the sum for which credit was given in the bill of particulars was paid to her husband in his lifetime, and that another portion was paid so recently after his decease that it could not possibly have been in respect of a debt due to herself. *Mercy v. Galot*, 13 Jur. 412.

Per Park, B.: "This rule must be made absolute to reduce the verdict to £5 1s. 6d. The evidence explains thus the credit of £21 12s. given in the bill of particulars; that part of the sum was paid in the lifetime of the husband, and therefore cannot be a payment on account of the demand in respect of which the plaintiff would be entitled to recover, and the remainder was paid so recently after his death that it is impossible to ascribe it to that demand. In *Smethurst v. Taylor* there was no such explanation, and we held that the parties were concluded by the statement in the particulars that they received a certain sum of money, and that they received it from the defendant. As, therefore, the explanation shows that £12 10s. was paid at such a time that it cannot be ascribed to the debt due to the plaintiff, the utmost she can recover is the balance which can be ascribed to that debt, viz., £5 1s. 6d."

PUBLIC COMPANY.

Describing a company.—The declaration described the defendants as "The City Steam Boat Company:" Held, on special demurrer, to be a sufficient description. *Woolf v. The City Steam Boat Company*, 13 Jur. 456.

NOTE.—On the case of *Reg. v. West*, 1 Q. B. Rep. 826, in which a coroner's inquisition, which stated certain goods to be goods of the Hull and Selby Railway, was held bad, because it did not appear that there was any corporation so entitled, being cited, *Cresswell, J.*, observed: "That case would have been more like an authority had the defendants been described as the proprietors of the City Steam

ABRIDGMENT OF CASES

RELATING TO

CRIMINAL LAW,

MAGISTRATES,

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TABLE OF ABBREVIATIONS OF REPORTS.

JUR. The Jurist.

LAW J., N. S., M. C. The Law Journal Reports, New Series, Magistrates' Cases.

NEW SESS. CAS. New Sessions' Cases, by Messrs. Carrow, Hamerton, and Allen.

Q. B., or Q. B. R. Queen's Bench Reports, by Adolphus and Ellis.

D. and L. Dowling and Lowndes.

NOTE.—The cases at the end of the placitum when enclosed between () are cases cited in the judgments; those cases which are not enclosed, and are in *italics* are the cases reported. The cases which follow "See" are either those quoted by counsel, or are such as we have added as being in point.

APPEAL.

1. *Order of removal—Time for appealing.*—Order of removal of a man, his wife, and children, in March, 1846. In the April following the man alone was removed (the execution of the order as to the wife and children not having been suspended), and notice of appeal given for the next Midsummer sessions, but not entered or heard in consequence of negotiations between contending townships. The pauper having returned to the removing parish was removed a second time with his wife and children, on the 23rd of December, under the same order. The appellant township then appealed to the Epiphany Sessions, 1847, against the order: held, that the appeal was too late. *Reg. v. Justices of Durham*, 5 D. and L. 82; S. C. 2 New Sess. Cas. 665; 11 Jur. 930; 16 Law Journ., N. S., M. C. 112.

Per Wightman, J.: "The parties are at liberty to make the order or removal the grievance. [This altered by s. 9 of 11 & 12 Vict. c. 31.] The appellants might have appealed against the first removal of the male pauper; they did not do so, however, but waited till December, and now wish to appeal against the removal of all the paupers; they are too late."

ABRIDGMENT OF CASES.

2. *Power of sessions to respite appeal—Order of removal—Mandamus.*—A pauper, who was a married woman, and whose husband had deserted her, was removed, under an order of removal, to the place of her maiden settlement, on the 26th of September, 1846. An appeal was entered and respited at the Michaelmas sessions. The appellant township, on the first of December following, obtained a warrant for the arrest of the husband, who was not apprehended till the 24th of that month, and, consequently, too late to give notice of appeal for the Epiphany sessions. At those sessions, however, the appellant parish appeared, and asked to have the appeal respited, on statement of these facts, to the Easter sessions. The Epiphany sessions having called the respondents before them, and heard their objections, namely, that no notice of appeal having been given, the sessions had no power to respite the case; and that, even if they had, they would not consider the circumstance such as to call upon them to exercise it; made an order respiting the appeal to Easter sessions on payment of the costs of the day by the appellants, without prejudice to the objection of want of notice of appeal. A valid notice of appeal was given for the Easter sessions, and on the case being called on the objection was renewed, that no notice had been given for the Epiphany sessions, and the sessions decided that the objection was fatal: held, that the Epiphany sessions had clearly power to respite, if in their discretion they thought fit; and that they must be taken to have exercised their discretion, reserving the question of their power; that the Easter sessions had therefore decided wrongly, and that a mandamus would lie to the sessions to enter continuances and hear the appeal. *Reg. v. Justices of Lancashire*, 5 D. and L. 264; S. C. 11 Jur. 1087.

Per Patteson, J.: "It seems to me that it must be taken that the Epiphany sessions were willing, in the exercise of their discretion, to respite the appeal further till the Easter sessions, but entertained a doubt as to their power to do so, no notice having been given. The facts of the whole case, I think, show that if they had that power they were willing to exercise it by respiting. I think also that it is clear that no question was raised at the quarter sessions as to the discretion, but as to the power only, and, therefore, the Easter sessions were wrong in imagining they had not power, which they clearly had."

BASTARD.

1. *Order of affiliation—Defective statement—Evidence not stated to have been given in presence of putative father.*—When a person against whom a summons is obtained under the 7 & 8 Vict. c. 101, appears at the hearing, it is necessary that the order made upon him should state that the evidence was given in his presence

and hearing, or the special circumstances should be stated, showing how it was that the evidence was not so given. An order of affiliation stated the appearance of the putative father, but the words "in the presence and hearing of the said" (as provided for by the schedule to the 8 Vict. c. 10) were struck out: held, on a motion for a *certiorari* to quash the order, that the order was bad for this omission. *Exp. Bunn*, 2 Bail C. 242.

2. *Order of affiliation—Notice of appeal—Sunday—Evidence of the mother to prove notice.*—In an appeal against an order of affiliation, the mother of the bastard child is a competent witness, under 8 & 9 Vict. c. 10, s. 6, to prove that she received due notice of appeal under 7 & 8 Vict. c. 101, s. 4, "the trial of the appeal" commencing the instant the appeal is called on for hearing. Notice of appeal is "process" within the meaning of 29 Car. 2, c. 7, and, therefore, where the adjudication on an order of affiliation was made on a Saturday, Sunday was held to be excluded from the computation of the twenty-four hours within which the notice of appeal is to be given. The 7 & 8 Vict. c. 71, s. 2, which gives to the adjourned sessions holden for the county of Middlesex power to try and determine appeals, as if they were general quarter sessions, merely gives an optional jurisdiction to such adjourned sessions, and does not take away the right of an appellant to wait, and to appeal to the general quarter sessions, if he be in other respects in time in his appeal to those sessions. *Reg. v. Justices of Middlesex*, 2 Bail C. 271; S. C. 12 Jur. 434.

Per Erle, J., "It seems to me that the 8 & 9 Vict. c. 10, s. 6, having rendered the evidence of the woman admissible, she is a competent witness on the trial of the appeal. There appears to be nothing unreasonable in this, which is quite in accordance with the enactment in this and other statutes. As soon, therefore, as the appeal is called on, it is competent for the parties to call witnesses in proof of their case. The trial may then be said to have commenced, as the statute enacts, 'That on the trial of any such appeal before any court of quarter sessions, the justices shall hear the evidence of the mother.' I think her evidence ought to have been received; as it appears from the affidavits on the part of the appellant, which are uncontradicted, that the woman could have proved the notice, had she not been objected to as incompetent for this purpose. I think also, with regard to the objection raised as to the service of the notice, that it comes within the meaning of the stat. 29 Car. 2, c. 7, s. 6, and could not, therefore, be served on a Sunday. Such a notice is very much in the nature of process, by giving authority to the court to proceed. The service of a declaration in ejectment is analogous. The cases cited (Taylor's case, 12 Modern Rep. 667;

Morgan v. Johnson, 1 H. Black. Rep. 628; *Taylor v. Phillips*, 3 East, 155; *Hughes v. Budd*, 8 Dowl. 317), are, I think, authorities very much in point; in several of which a notice has been held to mean process within the meaning of the words of the statute."

CHURCH-RATE.

Chapelry—Inequality of rate—Order of justice.—A chapel-rate was laid on the landowners of the chapelry only, exclusively of the holders and occupiers of mills and houses. Held, that an occupier of land within the chapelry, who did not object to the rate before the justices when summoned for non-payment, could not question its validity in an action of replevin, after distress on his goods under the justices' warrant. A chapel-rate duly made, but objected to from extrinsic circumstances, can only be questioned in the ecclesiastical court. An order of justices for payment of chapel-rates need not state the proceedings were taken "on oath." *Ramsbottom v. Duckworth*, 1 Exch. 506.

CONSTABLES.

Appointment of--Resolution of Vestry--Certiorari.—A certiorari will not lie to bring up a resolution of vestry for the appointment of paid constables under the 5 & 6 Vict. 109, s. 18, nor the copy of such resolution forwarded to the justices in special sessions, on which they made the appointment. But it will lie to bring up the appointment itself made by the justices in petty sessions, where the proceedings in vestry have not been conducted in conformity to the 58 Geo. 3, c. 69, amended by 59 Geo. 3, c. 85, a poll having been demanded and refused, and the resolution being carried by a show of hands. A certiorari being granted for that purpose, it is competent to the parties moving to show upon affidavit that the irregularity in the proceedings of the vestry was of such a nature as to take away the jurisdiction of the justice. *Re Constables of Slipperholme*, 5 D. & L. 79; S. C. nom. Reg. Just. West Riding of Yorkshire, 11 Jur. 713.

LUNATIC PAUPER.

1. *Chargeability—Sending copy of examination*—[see 11 & 12 Vict. c. 31, s. 1, *dispensing with copies of examinations*.]—An appeal against an order for payment of maintenance and expenses of lunatic pauper, under 8 & 9 Vict. c. 126, s. 62, which recites an order adjudicating the settlement of the pauper, is an appeal also against the settlement. The 8 & 9 Vict. c. 126, s. 62, incorporates so much of the 4 & 5 Will. 4, c. 76, s. 79, as is applicable to the case of an appeal against an order adjudicating the settlement of a lunatic pauper. A copy of the examinations must therefore be sent to the parish on whom an order for maintenance, &c., of a lunatic pauper, reciting an adjudication of the settlement is made. *Semble*, that in

the case of a lunatic pauper, notice of chargeability under 4 & 5 Will. 4, c. 76, s. 79 need not be sent. *Reg. v. Justices of Middlesex*, 5 D and L. 9; S. C. 11 Jur. 804.

Per Wightman, J.: "The principal question was, whether the 79th sect. of the Poor Law Amendment Act (4 & 5 Will. 4, c. 76) was incorporated in the 8 & 9 Vict. c. 126, so far as the same is applicable to that statute. At the time of the argument I entertained a strong impression that it was incorporated. I am still of that opinion. I further am of opinion, that wherever a provision in the 79th section of the Poor Law Amendment Act can be made applicable to the case of a pauper lunatic, such provision must be taken as incorporated in this act. The other point was, whether the order for payment included an adjudication of the settlement; it seems to me that it must be so, the terms of the clause warranting that view."

2. *Order of settlement under 7 & 8 Vict. c. 126 — Appeal — Certiorari.* — The principle of giving notice to a party to be affected by an order of justices, does not apply to orders of removal. The order of settlement made under 7 & 8 Vict. c. 126, s. 58 (Pauper Lunatic Act), is to be considered as an order of removal, and subject to the rules applying to orders of removal, and therefore, it is unnecessary to give any notice to the parties to be affected, of an intention to apply for such an order. Upon an appeal against the order of maintenance, provided for by sect. 62, the question of settlement may be gone into. *Ex parte Monkleigh*, 2 Bail. C. 189; S. C. 12 Jur. 355.

Per Erle, J.: "It is no doubt a well recognised principle of law, that where a proceeding is moved for by which a party is sought to be affected, he shall have an opportunity given him of showing cause against it; but it is well known not to be applicable to the case of an ordinary removal order. Thus the officers of the parish sought to be affected are never summoned, but the order is made *ex parte*, and if aggrieved, the parish officers are at liberty to appeal. It appears that by the 62nd section of the 8 & 9 Vict. c. 126, it is provided that all the incidents which accompany appeals against ordinary orders of removal shall apply to appeals against orders of maintenance made under that section. Upon reference to the 59th section it will be observed, that where a pauper lunatic is sought to be made chargeable to a county, a notice to appear before the justices is required to be served upon the clerk of the peace for that county. There is no enactment, however to be found, requiring the service of a notice upon parish officers."

MANDAMUS.

Costs—Demanding costs.—It is now a general rule, that the suc-

cessful party to a *mandamus* is entitled, on motion, to his costs; and it is for the opposing party to show special circumstances rendering the rule not applicable. No demand of costs is necessary before entitling a party to apply to the court for them. *Reg. v. Justices of Cheshire*, 2 Bail. C. 186; S. C., 12 Jur. 16.

Per Wightman, J.: "As a general rule, the costs of a *mandamus* follow the result of the writ, unless there be something to take it out of that rule, and, on the other hand, there is another rule, that where the error is committed by the court, no costs are given against either party in an application to set them right; but if the conduct of a party is such that a frivolous objection is taken in the court below, so as to render an application for a *mandamus* necessary, he ought to abide by the event. It certainly was not a very fair objection to take, and one by which the parties could not have been misled, because they attended at the sessions to take the objection. With respect to the necessity of there being a formal demand of the costs before moving for the writ, it seems it is not usual or necessary. The officers of the crown office inform me, that no such course is ever adopted in practice. There is no rule requiring an affidavit that the demand has been made."

2. *Costs—Justices*.—Where a *mandamus* has been applied for to justices at sessions, to compel them to perform an act they erroneously supposed they had no power to do; if the party, in whose favour such decision is given, opposes the application for the writ unsuccessfully, the general rule that an unsuccessful party must pay all the costs, is applicable. The court, however, may, under certain circumstances, make an exception in the exercise of its jurisdiction. *Reg. v. Just. Cumberland and Reg. v. Just. Lancashire*, 12 Jur. 1049.

Per Wightman, J.: "In *Reg. v. Oxted* (2 New Sess. Cas. 357; S. C. *nom.* *Reg. v. Just. Surrey*, 15 Law Journ. N. S. M. C. 117), Mr. Just. Patteson said, 'The general rule certainly is, that the costs follow the event of a *mandamus*; and I think that there ought to be good cause shown for departing from it. I do not say that such a case may not exist, but I think this is not that case. It is said that this is like a verdict set aside for misdirection, which is usually done without costs; and I was at first much struck with that argument. But it must be recollected that that is not always so; because where a court has committed an error, and a writ of error is brought, the practice is, that costs are given to the party bringing it,' * * In the present case, there does not appear to be any sufficient ground for taking them out of the general rule, that parties unsuccessfully opposing the issuing of writs of *mandamus* shall pay the costs. They are parties to the proceedings in this court, as well as those in the court below; and, if unsuccessful in the proceed-

ings here, are within the ordinary rule, that costs of applications for writs of mandamus, if opposed, will be given to the successful party."

PAUPER.

1. *Removable notwithstanding 9 & 10 Vict. c. 66.*—By the 9 & 10 Vict. c. 66, s. 1, no person shall be removed from any parish in which such person shall have resided for five years next before the application for the warrant. Provided that, whenever any person shall have a wife or children, having no other settlement than his own, such wife and children shall be removable whenever he is removable, and shall not be removable when he is not removable. Where a man having resided less than five years, in a parish, deserted his wife and children, who had no other settlement than his : held, that they were removable to the place of his settlement. *Reg. v. Inhabitants of St. Ebbe, Oxford*, 12 Jur. 1002.

Per Coleridge, Just. : "The enactment is, that no person shall be removed from a parish in which he has resided for five years. Then there is a proviso, that under certain circumstances, the five years' residence shall not have the effect of making the person irremovable. That raises a question between husband and wife and the father and children, where the father falls within the provision and is removable ; and it was, therefore, necessary to provide what should be done with the wife and children in that case. The question is on this last proviso, the nature of which is, that it refers to and limits the generality of the previous enactment ; and I think there is no doubt that the wife and children are within the enactment, and therefore are removable."

2. *Removable notwithstanding 9 & 10 Vict. c. 66.*—A pauper after residing eighteen years in S., was removed to C. under an order of removal in 1842, but after ten days, upon being allowed out-door relief, she returned to her cottage in S., where her children were, and remained in it until the allowance was discontinued in November, 1846 : held, that she had not resided in S. for five years within sect. 1 of stat. 9 & 10 Vict. c. 66, and was, therefore, removable. *Reg v. Inhabitants of Secnd*, 12 Jur. 939.

3. *Examinations*—[See 11 & 12 Vict. c. 31]—*Caption—Complaint of overseers.*—The caption of the examinations on which an order of removal is made must show that they were taken upon a complaint of the overseers who obtained the order, that the pauper had become chargeable to their parish (Erle, J., dissenting) : "It is not sufficient, if the caption only shows that the examinations were taken upon a complaint of the overseers touching the chargeability and settlement of the pauper, or if there does not appear to have been a complaint until the witnesses were examined. *Reg. v. Inhabitants of Sheffield* (and three other cases), 12 Jur. 791.

Lord Denman in delivering the judgment of the court, said : " We feel bound to adhere to the case of *Reg. v. Molesworth* (10 Jur. 662), and to all the cases in which, conformably with the decision in that case, we have upheld objections taken to the examinations for want of jurisdiction appearing to take them in the justices, or for want of a lawful occasion appearing to take the examinations and make order of removal. All these omissions are in our opinion fatal. My brother Erle does not agree in this opinion with the rest of the court. This rule, however, must be applied to the several cases now waiting for our judgment." The same point was decided in *Reg. v. Ashwell* ; *Reg. v. Witham* ; and *Reg. v. Monk Breton*, all reported in 12 Jur. 791.

5. *Examinations*.—[See 11 & 12 Vict. c. 31].—*Allegation in*.—The caption of the examination, upon which an order was made, stated a complaint of the overseers that the pauper had come to inhabit, but such complaint omitted to allege that the pauper was not settled in the complaining parish : held, sufficient. *Reg. v. Inhabitants of Addingham*, 12 Jur. 960.

5. *Removeable, notwithstanding* 9 & 10 Vict. c. 66.—*Continuity of residence broken*.—The pauper, after having been resident in the respondent parish for more than five years, was, before the stat. 9 & 10 Vict. c. 66, removed to, and relieved in, the appellant parish, for nineteen months, under an order of justices. He returned to the respondent parish, continued therein some months, and became again chargeable, after the statute, whereupon another order was made. The sessions discharged it, supposing that the pauper was become irremovable by virtue of the statute. Held, that the sessions were wrong, inasmuch as the first removal, though forcible, was a disruption of residence, and the case was, therefore, neither within the enactment nor the proviso of the 1st section of the statute. Before the first removal the pauper had rented a house in the respondent parish, of which, during the removal, she kept the key, in which she left furniture, and to which she was always desirous of returning, yet, since she had no right to return, while in a state of chargeability, the continuity of residence was broken in fact, and could not be implied in law. *Reg. v. Inhabitants of Halifax*, 12 Jur. 789.

Per Lord Denman, C. J. : " We take it to be clear, as a general proposition, that removal puts an end to residence. A review of the statutes under which the removal has been exercised from 13 & 14 Car. 2 downwards, shew, that the pauper was considered originally as an intruder upon the inhabitants, and the power of removing was given to prevent his becoming an inhabitant. A removal, therefore, is in its nature a disruption of residence and inhabitancy. That being the general principle of

the case, do the facts here stated in respect of the cottage and the desire of return constitute an exception? We think not. The right to return was taken away while the state of chargeability continued; the desire to return without the right is very different from the *animus revertendi* which, in some cases of absence, keeps up the continuity of residence."

TRAVERSING.

At sessions—Commission of gaol delivery.—A defendant in a case of misdemeanor, for which he was indicted at the quarter sessions, and in which he was entitled to traverse, did traverse. Held, that his traverse was to the next sessions, and not to the assizes, which came before the next sessions, and that the defendant being imprisoned in the gaol on this charge, the judge of the assizes would not discharge him on his own recognizance. If a prisoner be committed to "the gaol" for a trial at the quarter sessions which are to be held after the assizes, the judge at the assizes will discharge him on his own recognizance, if there be no indictment preferred against such prisoner at the assizes. The judge's commission of gaol delivery applies only to untried prisoners in "the gaol," and not to untried prisoners in houses of correction. *Reg. v. Arlett*, 2 C. and K. 596.

WITNESS.

1. *Attachment—Parish officer refusing to give evidence.*—On an application to justices at petty sessions for an order of removal, a witness attending there in obedience to a Crown office subpoena cannot refuse to give evidence as to the pauper's settlement, on the ground of his being either a rated inhabitant or officer of the parish on which the order is sought to be made. Affidavits used in moving for an attachment for refusing to give such evidence did not state that one of the justices at petty sessions, before whom the witness was subpoenaed to attend, was of the quorum, yet this was held sufficient. It is no objection that the subpoena issues before a complaint is made to the magistrates. *Reg. v. Vickery*, 3 New Sess. Cas. 193; S. C. 12 Jur. 581.

Per Lord Denman, C. J.: "The 9th sect. of 54 Geo. 3, c. 170, got rid of several of the objections to the competency of rated inhabitants as such. The cases of *Rex v. Woburn* (10 East, 403) and *Rex v. Hardwick* (11 East, 578) before that statute, were decided on the ground that the party to a suit could not be compelled to give evidence against himself. Mr. Philipps observes (*Evidence*, p. 395, n. 2), 'Before the 54 Geo. 3, c. 170, the admissions of rated parishioners were received on account of their being parties to the suit; and it would seem that the statute which renders parishioners competent witnesses does not interfere with the rule of evidence respecting admissions. The power of calling an inhabitant, even if he be compellable to become a witness, may

often not compensate for the loss of this admission.' Another act, the stat. 3 & 4 Vict. c. 26, which applies to parishioners and parish officers, by sect. 2 enacts, that no churchwarden, overseer, or other officer, in and for any parish, shall be disabled or prevented from giving evidence on any trial, appeal, or other proceeding, by reason only of his being a party to such trial, appeal, or other proceeding, or of his being liable to costs in respect thereof, when he shall be only a nominal party. The fair effect of those two statutes is to make a parish officer not a party in any respect, unless he is personally liable to pay costs; and is a direct answer to the objection taken by the witness himself to his own competency. It follows that he is not only competent but compellable, for whenever a party is competent to give evidence, he is compellable to answer. In *Reg. v. Adderbury East* (5 Q. B. Rep. 187; S. C. 7 Jur. 1035) it was not necessary to enter upon that principle, because my view of the facts was, that the parish officer in that case had acted as agent of the parish."

2. *Expences of indictment—Order on Treasurer of Liberty—Mandamus.*—By s. 24 of 7 Geo. 4, c. 64, an order for payment of the expences of a prosecution, except in the cases provided for by sect. 25, is to be made on the treasurer of the county in which the offence is committed or is supposed to have been committed. By sect. 25, all sums directed to be paid in respect of felonies and of certain misdemeanors committed or supposed to have been committed in liberties, franchises, cities, towns, and places which do not contribute to the payment of the county-rate, are to be paid out of the rate in the nature of a county-rate, or out of any fund applicable to similar purposes, by the treasurer; and where there is no such rate or fund, out of the rate for the relief of the poor by the overseers; and the order of the court must be directed to such treasurer or overseers, instead of the treasurer for the county. In a late case, upon the trial of an indictment for forging a will, it appeared that the will was written, and the signature of one of the witnesses was attached to it at Oswestry, which was a borough, not contributing to the county-rate, in the county of Salop; the signature of the second witness was attached in the county of Denbigh; the prisoner was apprehended in the county of Salop, and tried at the assizes of that county. The judge of assize made an order for payment of the expences of the prosecution upon the treasurer of Oswestry, under sect. 25 of 7 Geo. 4, c. 64. The Court of Queen's Bench held the order right, and granted a mandamus to compel the treasurer to pay such expences; but, *semble*, it has no power to discuss this jurisdiction over the order. *Reg. v. The Treasurer of the Borough of Oswestry*, 12 Jur. 744.

Per Patteson, J.: "I think the order was right. It appears that the offence was partly committed in Shropshire and partly in

Denbighshire. The indictment was, under sect. 12 of 7 Geo. 4, c. 64, and sect. 24 of 11 Geo. 4 and 1 Will 4, c. 66, rightly tried in the county of Salop; then the question is, in what part of the county was the offence committed? and it is clear that in no part of the county was anything done except within the borough of Oswestry; and therefore for this purpose the whole offence must be taken to have been there committed."

APPRENTICE.

Parish apprentice—Allowance of indenture by justices.—Where a child is bound by indenture of apprenticeship, under stat. 56 Geo. 3, c. 139, to a person residing within a different county or jurisdiction of the peace from that within which the place by the officers whereof such child is bound is situate, the allowance of the indenture by two justices for the county or district within which the place is situate wherein such child is intended to serve is a judicial act, and, therefore, must appear to have been done within their jurisdiction. *Reg. v. Totnes*, 13 Jur. 168.

Per Patteson, J.: "The pauper was bound to serve in a parish without the borough, and therefore in another jurisdiction than that of the justices who made the order. In such a case the 2nd section of stat. 56 Geo. 3, c. 139, enacts that the indenture is to be allowed by two justices of the county, and moreover provides that notice shall be given to the overseers of the parish in which the child shall be intended to serve, before any justice, for the county or district in which such place shall be, shall allow such indenture; and such notice shall be proved before such justice shall sign the indenture. It is strange that the word is in the singular number. What is the purpose of the notice to the overseers? They are not to appear before the justices of the borough, but before the justices of the county, to make their objections, if they have any. Surely the inquiry which then takes place must be a judicial one, as was decided in *Reg. v. Mills* (2 B. and Adol. 578); and the act of allowance by the second set of justices under such circumstances is the same in substance as the act of making the order by the first set of justices. It was almost conceded that the act of allowance must, in fact, be within the jurisdiction; but it was said that this need not appear on the face of the allowance. But I cannot distinguish between this and any other judicial act, and we have repeatedly decided that it is not enough to state that the justices were justices for the county or place, and that the defect cannot be supplied by extrinsic evidence; and, indeed, in

this case there is no such evidence. In *Reg. v. Stainforth* (12 Jur. 95) cases were referred to which, at first sight, afford some ground for the argument on behalf of the appellants; but they were all cases where a thing was to be done which the court have said need not be done within the jurisdiction. In *Reg. v. Stainforth* the original order was made by the same justices who made the allowance. In the present case I treat the allowance as equivalent to making the order; and this renders it quite unnecessary to consider what is the right construction of stat. 3 & 4 Will. 4, c. 63, because the order is bad under stat. 56 Geo. 3, c. 139, under which the order was clearly made."

BIGAMY.

1. *Evidence—Certificate—Identity.*—In an indictment for bigamy, where the first marriage was solemnised under the provisions of the 6 & 7 Will. 4, c. 85, the certificate authorised by that act and the 6 & 7 Will. 4, c. 86, coupled with the identity of the parties, is sufficient *prima facie* evidence of such marriage. *Reg. v. Hawes*, 1 Den. C. C. Rep. 270.

See *Reg. v. Kenrick*, 5 Q. B. Rep. 49.

2. *Evidence—Certificate.*—On an indictment for bigamy, it is not necessary to put the original register in evidence to prove a marriage. *Sayer v. Glossop*, 12 Jur. 465.

CASES RESERVED.

1. *Case—Validity of indictment inquirable, though not reserved.*—The Exchequer Chamber for reserved criminal cases under 11 & 12 Vict. c. 78 (see vol. i., N. S. 13) is bound to examine the validity of an indictment, though no question be reserved upon it. *Reg. v. Webb*, 13 Jur. 42.

2. *How case to be stated—Amending.*—The Court of Exchequer Chamber on reserved criminal cases expects cases reserved to be submitted to the judges in a complete form, and will ordinarily refuse to send back a case for amendment, under the 11 and 12 Vict. c. 78, s. 4. *Reg. v. Holloway*, 13 Jur. 86.

CHURCH-RATE.

Chapelry—Inequality of rate—Order of justice.—A chapel-rate was laid on the landowners of the chapelry only, exclusively of the holders and occupiers of mills and houses. Held, that an occupier of land within the chapelry, who did not object to the rate before the justices when summoned for non-payment, could not question its validity in an action of replevin, after distress on his goods under the justices' warrant. A chapel-rate, duly made, but objected to from extrinsic circumstances, can only be questioned in the Ecclesiastical Court. An order of justices for payment of chapel-rate need not state the proceedings were taken "on oath." *Ramsbottom v. Duckworth*, 1 Exch. 506.

CONSTABLES [*ante*, p. 4].

Appointment—Substitute.—By s. 3 of 5 & 6 Vict. c. 109, the inhabitants in vestry shall make out a list of men qualified and liable to serve as constables, out of which, by sect. 11, the justices shall choose a sufficient number of constables. By sect. 12 it is provided, that if any qualified person, chosen as aforesaid, shall be unwilling to serve in person, and shall find a substitute, the justices, if they approve of such substitute, shall cause the oath to be administered to him. Held, that the substitute need not be on the list made out by the vestry. *Semble*, that the substitute need not have the qualification required by sect. 5. Quo warranto lies for the office of constable. *Reg. v. Booth*, 18 Law Journ., N. S., M. C. 25; S. C. 13 Jur. 6.

Per Coleridge, J.: "There is nothing in the statute of 5 & 6 Vict. c. 109, which shows affirmatively that the substitute for a person chosen to be constable, must be qualified in the sense of his name being inserted in the list prepared by the vestry. By the proviso in sect. 3, the vestry may annex to their list the names of any number of men willing to serve the office of constable, and whom they recommend to be appointed, although not having the qualifications mentioned in s. 5; and therefore an unqualified person may, under certain circumstances, serve as principal. It would be strange if an unqualified person might serve as principal, and not as substitute. In the list made out and returned by the vestry an unfit person may be named, and he may be chosen by the justices, under s. 11; the Legislature cannot have intended that, in finding a substitute, he should be confined to the persons in the list."

DEMURRER.

Effect of over-ruling—Final judgment.—In 4 Steph. Com. (p. 431, 2nd edit.), speaking of a demurrer to an indictment, it is said, "If the judgment be against the defendant, and the offence for which he is indicted be a misdemeanour or a felony, but not capital, such judgment, according to the better authorities, is final." So in *Hawkins' Pleas of the Crown* (c. 31, s. 7) it is said: "It seems that in criminal cases not capital, if the defendant demur to an indictment, whether in abatement or otherwise, the court will not give judgment against him to answer over, but final judgment." In *King v. Taylor* (3 B. and Cr. 502), it is laid down: "The reason of the rule is in favour of life; but as the reason of the rule does not apply to misdemeanour cases, the rule ought not to be extended, &c.; therefore, the judgment ought to be final." In the case of the *Queen v. Phelps* (1 Q. and M. 180), which was an indictment for murder, *Coltman, J.*, says, "The prisoners may demur and plead over to the felony at the same time; or they may demur, and if the demurrer should be decided against them, they may plead over to the felony." That,

however, was an indictment for a capital offence. The next case was *Queen v. Adams and others* (1 C. and M. 299); an indictment for assembling to destroy a house, which offence had been capital until a short time previous to the trial, and the prisoner was allowed to demur and plead over to the felony, and the authority of the *Queen v. Phelps*, which was a capital case, was relied on. The next authority was the *Queen v. Purchase* (1 C. and M. 617), an indictment for embezzlement, and Patteson, J., says, "I think there is no doubt the prisoner may demur and plead over to the felony." These cases were overruled by *Queen v. Ogers* (2 M. and Rob. 479), which was an indictment for cutting and maiming; and Cresswell, J., says, "It is admitted that the only mode of the prisoner's taking advantage of the objection would be by demurrer; and it is said, that in felonies he might demur and plead over at the same time. I am decidedly of opinion the prisoner has no such right; and Mr. Justice Patteson and myself, after consultation on the Oxford circuit, agreed that it ought not be allowed. If a prisoner demurs, he must abide the consequences." In the *Queen v. Bowan* (C. and K. 501), which was an indictment for destroying a registry of baptism, the prisoner being called on to plead, Tindal, C. J., says, "This is not a capital case; you may, therefore, be bound by your demurrer, and may not be allowed to plead over. It is a very doubtful point. I give no judgment; I only forewarn counsel that he may be concluded by the demurrer." This subject was fully considered in the late well-known Irish case of *Reg. v. Duffy* (1 Irish Jurist, 167), where it was held that the court will not pronounce final judgment on an indictment for a felony not capital, on the over-ruling of a demurrer to the indictment.

Per Ferrin, J.: "In this case the court has already pronounced judgment upon the demurrer to the indictment, the effect of which is, that as to the first and third counts, the demurrer has been overruled, and as to the overt acts in all the other counts, except the first, the demurrer has been allowed. The Crown now calls for final judgment, but the prisoner's counsel insists that he is entitled to plead. In the course of the argument several cases have been cited on both sides, and we have looked into them all, but my brother Richards has furnished me with a case which was not mentioned, and it is not only the most modern, but was decided so lately as the year 1845, and since this question was under the consideration of the English judges in *Gray's case*; I allude to the case of *Queen v. Serva* (2 Car. and K. 53), in which, after a demurrer to the indictment was overruled, the prisoner was permitted to plead over to the felony. We consider it right to follow that decision, and, as was done in the precedent referred to by Mr. Butt in *Rastall* (Ext. 584) after judgment upon the demurrer,

at the desire of the prisoner, we will allow him to plead to the felony."

EVIDENCE.

Confession—Inducement held out.—A girl, thirteen years of age, was convicted of administering poison to her mistress with intent to murder her. At the trial her confession was received in evidence, it appearing that, before the confession was made, the surgeon in attendance had told her "it would be better for her to speak the truth:" held, that the confession, under such circumstances, was inadmissible, and that the conviction could not be maintained: held, also, *per* Patteson, J., that a prisoner ought to prove affirmatively that an inducement has been held out, before evidence of a confession ought to be rejected. *Reg. v. Garner*, 18 Law Journ., N. S., M. C. 1; S. C. 13 Jur. 944; S. C. 3 New Sess. Cas. 329.

See *Reg. v. Laughner*, 2 Car. and Kirwan, 225.

FIRE-ENGINE.

Reward—Churchwardens refusing to name amount—Magistrates' power.—By s. 76 of 14 Geo. 3, c. 78, the engine-keeper who first brings a parish-engine, or other large engine, to any fire happening within the limits mentioned in the act, shall be paid any sum not exceeding 30s.; the keeper of the second parish-engine, or other large engine, which shall be next brought, shall be paid any sum not exceeding 20s.; every such payment to be made by the churchwardens of the parish where such fire shall happen, and in default of payment, such reward shall be levied by distress and sale of the goods and effects of such churchwardens. By sect. 77 no such reward shall be paid to any engine-keeper by the churchwarden without the approbation and consent of a justice of the peace for the county of Middlesex, or county of Surrey, where the same may happen, residing within such parish. Upon a summons obtained against the churchwardens by an engine-keeper in the employment of the London Fire-engine Establishment, who had brought the second large engine to a fire in their parish, they declined to name any sum, or to ask the approbation or consent of the justice for them to pay any sum to the applicant: held, that, under sect. 76, the applicant was entitled to a reward; and that, under sect. 77, the justice, upon his application, ought to fix the amount of it (*exp. Loader*, 13 Jur. 192).

Per Coleridge J.: "The scope of the act is, that the persons who come with the first, second, and third engine are absolutely to have some reward; and by sect. 76, the party entitled is to apply, in the first instance, to the parish officers for payment of it. Then the act, contemplating that they might be disposed to pay too largely, by sect. 77, in favour of the rate-payers of the parish, requires the sanction of a resident magistrate to the payment.

The parties go before the magistrate and the applicant proves his right to the reward. If the parish officers refuse to fix any sum the magistrate may form his own opinion as to the amount, and the applicant is entitled to an order for payment of it."

FORGERY.

1. *Filling up blank cheque with improper amount.*—A. gave B., his clerk, a blank cheque, and directed him to fill it up with the amount of a bill and expenses (for which A. had to provide, and which amount B. was to ascertain), and get the cheque cashed, and pay the amount to Mr. W., and take up the bill. The bill was for £156 9s. 9d., the expenses about 10s. B. filled up the cheque with the sum of £250, got it cashed, and kept the whole amount, alleging that it was due to him for salary: held, by the judges, that this was forgery, and that this was so even if B. *bond fide* believed that £250 was due to him from A., or even if it were really due to him. *Reg. v. Wilson*, 2 Car. and Kirw. 527; S. C. 1 Den. C. C. R. 284; 17 Law Journ., N. S., M. C. 82.

Per Coltman, J.: "I think on the authority of the cases of *Reg. v. Minter Hart* (7 Car. and Pa. 652), and *Reg. v. Bateman* (1 Cox's Cr. C. 186), that this a forgery."

NOTE.—In *Reg. v. Bateman*, which was a charge of forgery arising on the filling up of a blank cheque, Mr. J. Erle said: "If a cheque is given to a person with a certain authority, the agent is confined strictly within the limits of that authority, and if he choose to alter it, the crime of forgery is committed. If the blank cheque was delivered to him with a limited authority to complete it, and he filled it up with an amount different from the one he was directed to insert; and if, after the authority was at an end, he filled it up with any amount whatsoever, that too would be clearly forgery." And Mr. J. Patteson said: "I quite agree that if the prisoner filled up the cheque with a different amount, and for different purposes than those which his authority warranted, the crime of forgery would be undoubtedly made out."

2. *Railway Ticket — Forgery at common law — Uttering forged instrument.*—The forgery of a railway pass to allow the bearer to pass free on a railway, is a forgery at common law; but the uttering of it *per se* is not a misdemeanour. The uttering of a forged instrument, the forgery of which is only a forgery at common law, is no offence, unless some fraud was actually perpetrated by it; and where in such a case the indictment contains some counts for forging the instrument, and others for uttering it, and the defendant was acquitted on the counts for the forgery and convicted on the counts for the uttering, the judgment was arrested. *Reg. v. Boulton*, 2 Car. and K. 604.

Per Cresswell, J.: "I have not found any case in which an

indictment for uttering a forged instrument at common law has been maintained, unless some fraud was actually perpetrated by it, which is not the charge in this indictment; Mr. J. Patteson is not aware of any case on the subject. That the forgery of this instrument was a forgery at common law there is no doubt; but my opinion is that the charge of uttering cannot be sustained, and the judgment must be arrested."

HIGHWAY.

Order of magistrates under 4 & 5 Vict. c. 59—Intendment of facts to support jurisdiction—Particularity—Affidavit—Highway rate applied to turnpike-road.—By the 4 & 5 Vict. c. 59, s. 1, justices at any special sessions for the highways, upon information exhibited before them by the clerk or treasurer of any turnpike-trust that the funds of the trust are insufficient for the repairs of the turnpike-roads within any parish (notice thereof having been given twenty days previously) may examine the state of the revenues and debts of such turnpike-trusts, and inquire into the state and condition of the repairs of the roads within the same, and also ascertain the length of the roads, including turnpike-roads, within such parish, and how much of such road is turnpike-road, and if expedient, the justices may then adjudge and order what portion, if any, of the rate or assessment levied, or to be levied by virtue of the 5 & 6 Will. 4, c. 50, shall be paid by the said parish surveyor, and at what time or times, to the said commissioners or trustees, or to their treasurer, &c., such money to be wholly laid out in the actual repairs of such part of such turnpike-road as lies within the parish from which it was received. The following points on the above statute have been lately decided, namely, that the notice of an intended information before a special sessions, for the purpose of obtaining an order for payment of a portion of a highway rate to the trustees of a turnpike-road, under the 4 & 5 Vict. c. 59, need not state what portion of the road is out of repair, or to what purpose the money is to be applied, or that the road is within the division for which the sessions are held. The order made in pursuance of such information need not adjudicate that the information is true, or that notice was in fact given; it is sufficient if it shows that an information has been exhibited, and that the justices proceeded to act upon it. It is not necessary that the order should specify the precise part of the road to the repair of which the portion of the rate is to be applied, the object of the statute being to ascertain the amount of the fund necessary for the general repair of so much of the turnpike-road as is within the parish. Where an order recited an application to the justices to order a portion of the rates "to be levied by virtue of the statutes in that case made and provided for the repair of the highways within," &c., to be paid, &c., and the order directed a certain

sum to be paid "out of the rate which shall next be made for the repair of the highways within, &c.," it was held that the order must be taken to refer to the application, and was, therefore, warranted by the statute. When such order is made on the surveyor of the highways of a hamlet, it is to be considered as stated, by reasonable intendment, that the hamlet is one maintaining its own highways. The order need not set out the state of the revenues of the trusts, or the length of the roads, or the other particulars into which justices are to inquire by the statute. Where an order recited that the surveyors of the highways appeared in pursuance of a notice from the clerk of the turnpike-trust, given pursuant to the statute, and there was an affidavit stating that, though such notice was in fact given, the surveyors did not appear, but purposely absented themselves, there being no reason to suppose that the order was intentionally false, and the variance being immaterial to the validity of the proceeding, it was held that it was no objection to the order. *Reg. v. Preston*, and *Reg. v. Longbottom*, 18 Law Journ., N. S., M. C. 4.

LARCENY.

1. *Oats for master's horses—Lucri causæ.*—Prisoners charged with stealing their master's oats, proved that they took them wrongfully to give to their master's horses, without any end of gain to themselves: held, a larceny. *Reg. v. Privett*, 1 Den. C. C. R. 193.

The greater part of the judges present (exclusive of Erle, J., and Platt, B.) appeared to think that this was larceny, because the prisoner took the oats knowingly against the will of the owner, and without colour of title or of authority, with intent, not to take temporary possession merely, and then abandon it (which would not be larceny), but to take the entire dominion over them, and that it made no difference, that the taking was not *lucri causæ*, or that the object of the prisoners was to apply the things stolen in a way which was against the wish of the owner, but might be beneficial to him. But all agreed that they were bound by the previous decisions (*R. v. Morfitt*, Russ. and Ry. 307; *R. v. Cabbage*, Russ. and Ry. 292), to hold this to be larceny, though several of them expressed a doubt if they should have so decided if the matter were *res integra*. Erle, J., and Platt, B., were of a different opinion; they thought that the former decisions proceeded in the opinion of some of the judges on the supposition that some of the prisoners would gain by the taking, which was negatived in this case; and they were of opinion that the taking was not felonious, because to constitute larceny, it was essential that the prisoner should intend to deprive the owner of the property in the goods, which he could not if he meant to apply it to his use.

2. *Destroying letter—Lucri causd.*—A servant of B. applied for at the post-office and received all the letters addressed to B. She delivered them all to B. except one, which she burned. Her motive for destroying it was the hope of suppressing inquiries respecting her character : held, a larceny, and that, supposing *lucri causd* to be a necessary ingredient therein (which the court did not admit), there was a sufficient *lucrum* proved. *Reg. v. Jones*, 1 Den. C. C. R. 183.

All the judges present, except Platt, were of opinion that it was larceny ; for supposing that it was a necessary ingredient in the crime, that it should be done *lucri causd* (which was not admitted), there were sufficient advantages to be obtained by the prisoner in making away with the written character. Platt, B., doubted whether the prisoner was guilty of the offence of larceny.

3. *Removing goods from one part of premises to another—Depriving owner of his property.*—To constitute larceny there must be a wrongful taking, with intent wholly to deprive the owner of the dominion over the property. Therefore, where A. employed in a tannery, clandestinely removed certain skins of leather from the warehouse to another part of the tannery, for the purpose of delivering them to the foreman, and getting paid for them as if they had been his own work, it was held that this did not amount to larceny. *Reg. v. Holloway*, 13 Jur. 86.

Per Parke, B. : " This is no larceny ; the passage in the '*Mirror*,' is explained by subsequent cases. The most correct definition of larceny is that of East (1 East, P. C. 553) ; yet that definition is defective ; it ought to be added that the chattel was taken without any colour of right. Many cases are collected in Russell's work, in which it has been held, that if there was not an intention to usurp the entire dominion it was not larceny. In *R. v. Webb and Moyle* (1 Moo. C. C. 431), where there was a removal of articles for the purpose of getting a high reward, the judges decided that there was no larceny, unless it is made out to the jury that the prisoner intended to usurp the entire dominion of the article, and deprive the owner of it wholly, there can be no conviction of it for larceny. In this case a prisoner attempted to practise a false pretence."

4. *Removing goods from one part of premises to another with the intention of obtaining money for same.*—A servant of B., a tallow-chandler, clandestinely removed a quantity of fat, the property of B., from an upper room in B.'s warehouse to a lower room in the same place, and placed it in a pair of scales ; and afterwards represented to B., that a butcher named D., had sent fat to be purchased and paid for by B. : held, that A. was rightly convicted of larceny. *Reg. v. Hall*, 13 Jur. 87.

Per Lord Denman, C. J. : " The taking is admitted ; and the facts prove an *animus furandi*. If there must be a taking with intent to deprive the true owner of the property, how could the prisoner more effectually deprive him of the property than by selling it as the property of another ? I think the learned recorder's decision was quite right."

MANDAMUS.

Defect in writ—Taking objections to form of writ after return—Attorney—Lord Mayor's court—Inferior courts.—Mandamus to the mayor and aldermen of London to admit A., an attorney of one of the superior courts at Westminster, to be an attorney of a " certain inferior court within the city of London, called the Lord Mayor's court, on signing the roll of the said court." Return stated the Lord Mayor's court to be an immemorial court of record, having by custom jurisdiction as a court of law and a court of equity, with immemorial and peculiar privileges, which were set forth ; and that there had been immemorially four attorneys only, who enjoyed the exclusive right of practising in that court, and some of whose duties were peculiar ; and that their offices were the subject of purchase and sale, and that there was not, and never had been, a roll for the applicant to sign : held, that the writ was bad for not stating the mayor's court to be an inferior court of law ; and that the defect was not cured by the admission in the return, that the mayor's court was a court of law. *The Mayor and Aldermen of London v. Reg.*, 13 Jur. 33.

Per Parke, B. : " The objection to it is that it does not state that the Lord Mayor's court is an inferior court of law, but only an inferior court, and it is only to inferior courts of law that attorneys of the superior courts of law are entitled to be admitted. The mandamus does not show any obligation to admit to this court. This objection is fatal, unless the return, which admits it to be a court of law, cures the defect. On a plea, an admission of that nature would have that effect, though the plea should be bad ; but it was argued, that in a mandamus the judgment is, that the return be quashed ; and, if that be the case, it is the same as if no return were made. The judgment in this case, is, however, not that the return is to be quashed, but that it is invalid in law. But a peremptory mandamus is always awarded, and that form being used, it must be the same, as the one originally awarded, otherwise the defendant would have a right to make a new return to it. The peremptory mandamus would, therefore, on the face of it be equally bad, and derives no benefit from the admission in the previous return. We think, therefore, that no peremptory mandamus ought to go in the present form ; and, consequently, the judgment of the Court of Queen's Bench

awarding such mandamus ought to be reversed. It is now perfectly settled law, that, after the return to a mandamus, objections may be taken to the form of the writ. That was decided in the case of *Rex v. the Margate Pier Company*, (3 B. and Ald. 220), and in *Reg. v. Powell*, (1 Q. B. Rep. 352; 5 Jur. 605). The judgment, therefore, of the Court of Queen's Bench must be reversed upon this ground. This was a matter which does not appear to have been considered in the Queen's Bench at all."

2. *Several prosecutors—Partners—One not joining—Using his name—Quashing—Railway Compensation.*—A railway company gave notice to B., G., and D., trading in co-partnership, of their intention to take certain premises occupied by them, for the purposes of the railway, under the power of the act of Parliament constituting the company, which incorporated the 8 Vict. c. 18. A mandamus having been granted to the company, commanding them to issue their precept for summoning a jury to assess the amount of compensation to be paid to B., G., and D., the court refused to quash the writ of mandamus, although it was alleged to have been obtained without the knowledge or assent of D., one of the co-partners, but left the defendants to make a return of the facts if they should think fit. *Reg. v. London and South-Western Railway Company*, 13 Jur. 10.

Per Patteson, J.: "With respect to the power of partners binding one another, a great deal of difficulty may arise on this act; one is with respect to arbitration. It appears a matter of discretion with the parties claiming compensation, whether it should be settled by arbitration or not. If they elect to do so, all the parties must agree; either there must be a joint appointment, or no appointment at all; and the claim must then be settled by a jury. The company have a right to take the premises, and there must be some mode of settling the claim. If one party says he will not assent to the appointment of an arbitrator, a jury must be summoned, notwithstanding, D.'s notice to the company. The company are perfectly safe in acting on the inquiry, in the same way as if D. were a party. I do not see how the company can proceed by arbitration, because the other partners, B. and G., will not agree. The inquiry must, therefore, be by a jury. The only mode, if the company still persist in refusing, is by returning these facts on the mandamus. The rule ought never to have been granted, and must, therefore, be discharged."

MANSLAUGHTER.

1. *Assault.*—By the 7 Will. 4 and 1 Vict. c. 85, s. 11, it is provided that on the trial of any person for any felony whatever, where the crime charged shall include an assault against the person, the

jury may acquit of the felony, and find a verdict of guilty of assault. A prisoner indicted for manslaughter was proved to have assaulted the deceased some time before her death; but the surgeon who examined the deceased after death was of opinion that her death was owing entirely to natural causes. Held, that in such a case the jury could not find the prisoner guilty of an assault under 7 Will. 4 and 1 Vict. c. 85, s. 11. *Reg. v. Conor*, 2 C. and K. 518.

Serjeant Murphy (after consulting with C. B. Pollock) directed the jury to acquit the prisoner, as he was of opinion that they could not convict him of an assault under the 1 Vict. c. 85, s. 11, the surgeon not having been able to state that the deceased's death was connected with or accelerated by the assault; but that witness, on the contrary, being of opinion that—the last assault committed by the prisoner on the deceased having been some time before her death, and there being scarcely any marks of violence on her person—the lapse of time was sufficient to disprove any connexion between the assault and the death, and that the proximate cause of the death had been consumption." See also *Reg. v. Crompton* (Car. and M. 597), in which Patteson, J., said: "I think that no assault is included in a charge of manslaughter which does not conduce to the death of the deceased, although the death itself be not manslaughter. Here the surgeon disconnects this assault from the death; and I think, therefore, that the prisoner is entitled to be acquitted altogether."

2. *Infant unnamed—Exposing child to weather—Misfeasance.*—

A prisoner was convicted of the manslaughter of an infant female child, on an indictment which stated the death to have been caused by exposure, whereby the child became mortally chilled, frozen, and benumbed. It was held that as the death was attributable to an act of misfeasance, it was necessarily implied that the child was of such tender age and feebleness as to be incompetent to take care of herself. "Not named," is a good description of an unbaptized child. *Reg. v. Waters*, 13 Jur. 130.

Per Parke, B.: "If the second count had laid the cause of death to be a non-feasance only, it would have been bad, for it contains no averment that the child is of tender years; and the reference to the first count is insufficient, because it does not say, after the words "so born of the body," &c., "and so being of tender age," &c. (see the judgment of Patteson, J., in *Reg. v. Martin*, 9 Car. and Pay. 217). But the act charged in the second count is a misfeasance; and, if the death is traced to the wrongful act of the prisoner, the conviction is right. The second count states that the prisoner exposed the infant to the cold air, and that that exposure was the cause of her death. It is not expressly averred

that the child was not sufficiently strong to walk away ; but this is implied. So, in an action on the case for negligence, the general rule of law is that unless the plaintiff by the exercise of ordinary care, might have avoided the consequence of the defendant's negligence, the plaintiff is entitled to recover (*Bridge v. the Grand Junction Railway Company*, 3 Mees. and W. 244; *Davies v. Mann*, 12 Mees. and W. 546). The count, therefore, is good in this respect. The learned judge seems also to have entertained a doubt as to the description of the child. "We are of opinion, however, that the description "not named," is in this case enough."

MISCARRIAGE.

Attempt to procure miscarriage.—In an indictment under the 1 Vict. c. 85, for using an instrument with intent to procure miscarriage, it was held immaterial whether or not the woman was pregnant at the time of the instrument being used. *Reg. v. Goodhall*, 1 Den. C. C. R. 187.

NOTE.—This case should be noted in 1 Russell on Crimes, 673, n. (j.) where it is stated that doubts existed on the above point.

MURDER.

Internal injury—Cutting and wounding.—An indictment for murder by inflicting a mortal wound, is supported by proof of a blow, which caused an internal breach of the skin, though externally there was only the appearance of a bruise. *Quere.*—Whether such an allegation would have been sufficient in an indictment on the statute for cutting or wounding with intent to murder. *Reg. v. Warman*, 1 Den. C. C. R. 183.

Reg. v. Smith (8 Car. and P. 173), having been mentioned to Alderson, B., as an authority in point, that judge said he thought it was so, and further, that this being a case of homicide it was sufficient if the mode of death was substantially proved as laid ; and that here the death was sufficiently shown to have arisen from a stroke feloniously given by an instrument held by the prisoner, and that whether that stroke produced the death by inflicting a wound or a bruise was unimportant.

NEW TRIAL.

After acquittal—Mis-direction—Non-repair of highway.—In *Rex v. Sutton* (5 B. and Adol. 52), which was an indictment for the non-repair of a bridge, Lord Denman said : " Upon consideration of all the points which have been raised, we are not disposed at present to make the precedent of granting a new trial ; but we think the precedent in *Rex v. Wandsworth* (1 Barn. and Ald. 63), may be very properly followed here by suspending the judgment. Then a new indictment may be preferred, and the points which have arisen may be discussed upon that. In a late case it was laid down by the

Court of Queen's Bench that a new trial may be granted in a criminal case after acquittal. *Reg. v. Cricklade*, 13 Jar. 33.

The indictment was for non-repair of a highway, and Lord Denman having observed the practice had been to move to stay the judgment until a new trial had been had, it was answered that having been preferred under an order of justices, a second indictment would not come within that order, and Lord Denman then said: "We think that you need not resort to a motion to suspend the judgment. We are not bound by the ordinary practice in this case. A motion may be made directly for a new trial, if the verdict appears unsatisfactory." Mr. Justice Coleridge having observed that the mode of suspending the entry of the judgment adopted in *Rex. v. Wandsworth* (*supra*); was a novelty, Lord Denman said: "It was in fact an evasion resorted to upon the ground that the court would never interfere with an acquittal in a criminal case, which is erroneous (see *Rex. v. West Riding of Yorkshire*, 2 East, 352, note; 1 Chit. 354)..." Note this case in 4 Steph. Com. 462, 2nd edit.; First Book, 436, 437.

NUISANCE.

Open and notorious lewdness—Indecent exposure.—A. was indicted for a nuisance at common law, in indecently exposing his person in the presence of B., a married woman, "and of divers other of the liege subjects of our lady the Queen." The evidence was, that no other person but B. was present at the time. It was held, on a case being reserved, that those words were material, as exposure to one person only is not at common law an indictable offence, and that the conviction could not be maintained. *Reg. v. Webb*, 13 Jur. 42.

Per Pollock, C. B.: "It appears to me that a conviction ought not to have taken place, and I consider that the case of *R. v. Watson* (2 Cox, C. C. 376) covers this case. It is not necessary to decide whether this indictment be sustainable or not, though, in passing, I may say that it would be better to adhere to the usual precedents. *R. v. Watson* decides my judgment. There, there were two counts; and on proof that the act was done in the presence of but one person, the defendant was acquitted on the second count; and, subsequently, judgment was arrested on the first count, which alleged the act to have been done in the presence of but one person. Now, the evidence in the present case, shows that but one person was present when the act that would constitute an indictable offence was committed. Striking out of this indictment all that was not proved, it brings the present case within the principle which governed the decision in *R. v. Watson*. The result will be, that all that makes the case different from the

one cited will be struck out, and the indictment will become one which, on the authority of *R. v. Watson*—a case that we fully confirm—we ought to arrest, since the evidence is only sufficient to sustain such an indictment as in *R. v. Watson*; therefore, no conviction ought to have taken place."

OVERSEERS.

Appointment in boroughs, &c., by mayor, &c.—The mayor or head officer of towns corporate and boroughs has the sole appointment of overseers, by virtue of s. 8 of 43 Eliz. c. 2, and s. 6 of 5 & 6 Will. 4, c. 76. *Reg. v. Preston*, 18 Law Journ., N. S., M. C., 10; S. C. 13 Jur. 7.

Per Lord Denman: "I have no doubt in this case. By s. 6 of the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, the mayor of a borough is capable, in law, to do all acts which the chief officer of such borough might lawfully do at the time of the passing of that statute. One of those acts is to appoint overseers, by virtue of s. 2 of 43 Eliz. c. 2; and this is made more clear if possible by s. 10, which imposes a fine upon the mayor if the appointment is not made. Counsel argues that at that time mayors were the only justices, and therefore that other justices could not be mentioned; and he says that explains why the enactment is confined to mayors, because, if the Legislature thought that to name the mayor was the same thing as to name the justices, they could have done so; but the answer is that they have not done so. In *Rex v. Butler* (1 W. Black. R. 649, 650) Lord Mansfield was shocked to hear it contended that the Mayor, being a returning officer, had the power to appoint all the overseers in a town, which might consist of many parishes, and I can see that it was natural to take that view, if attention was not given to the words of the statute. But that case is no authority in support of this rule; and the words of the statute are perfectly clear."

Since the above case was in type the 12 & 13 Vict. c. 8, has been passed, giving the power of appointing overseers in cities and boroughs to the justices of the peace thereof. See vol. 1 Mag., N. S., p. 172. The reference there to this abridgment should be altered from p. 16 to this page.

PAUPER [*ante*, p. 7].

Irremovable—9 & 10 Vict. c. 66 [*see amendment of*, *ante*, vol. 1, N. S., p. 63]—*Finding animus revertendi*.—In January, 1841, a pauper settled in the appellant parish, was residing with his wife and family in two rooms hired by the quarter, being part of a dwelling-house in the respondent parish, and, being out of work, he went to the appellant parish for the purpose of obtaining work or relief, and was employed by H., the overseer of that parish, and continued so employed for six or seven weeks, during which he lodged in the

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poor-house there, being paid wages by H. At the end of that time he returned to his wife and family, who, whilst he was absent, resided in the same two rooms, and were maintained there by him, and he resided there with his family until the application for a warrant of removal: Held, that the pauper was irremovable by sec. 1 of stat. 9 & 10 Vic. c. 66. Where an animus revertendi exists, it should be found by the sessions. *Reg. v. the Inhabitants of Pacolstone*, 13 Jur. 80.

2. *Grounds of appeal* [see 11 & 12 Vic. c. 31, *ante*, vol. 1, N. S., p. 11—13]—*Caption of examinations*—9 & 10 Vict. c. 66—*Irremovable*—*Wife of prisoner*.—Grounds of appeal against an order of removal stated that the order and the examinations were bad, and that the order was not made upon the complaint of the overseers of the removing parish: Held, that the appellants were not at liberty under them to take objections to the caption of the examinations. On the trial of the appeal, it appeared that the relieving officer of the union relieved the pauper in the respondent parish, upon the application of one of the overseers of that parish; that, by order of the board of guardians, he continued such relief for a month, and charged the amount to the respondent parish. The relieving officer weekly obtained a cheque from the board of guardians, and paid the relief out of the proceeds. The sessions having quashed the order, subject to the question whether the evidence of chargeability was sufficient, the Court of Queen's Bench held that chargeability was proved, and quashed the order of sessions. A pauper, who had resided with her husband till his commitment to a prison out of the parish in April, 1846, at which time the five years' residence required by stat. 9 & 10 Vic. c. 66, was not complete, is removeable under the proviso in s. 1, the effect of that proviso being that the wife is removeable, if, under the circumstances, the husband, having come to her and become chargeable, would have been removeable. *Reg. v. the Inhabitants of Pott Shrigley*, 13 Jur. 60.

Per Lord Denman, C. J.: "The first question was, whether the examinations were stated to be taken on the complaint of the churchwardens and overseers, and the ground of appeal was specifically confined to this question. The examinations are stated as so taken, and we are of opinion that the appellants are not at liberty, even on this ground of appeal, to contend that the matters complained of are not sufficiently specified; and that for this reason *Reg. v. Gomershall* (17 Law Journ., N. S., M. C., 163; S. P. as *Reg. v. Sheffield*, 12 Jur. 791) does not apply. The second question was, whether chargeability was shown on the examinations and proved at the trial; and we think it was shown by the statement of relief being given, and proved by the evidence, according to *Reg. v. Marlow* (11 Jur. 240), and *Reg. v. Croudall*

(11 Jur. 922). The third question was, whether the pauper had become irremovable, as she had resided in the respondent parish for five years next before the application for the order. She was the wife of a man who, in April, 1846, was committed to a prison out of the parish upon a charge for which he was, at the summer assizes, sentenced to be transported. She had resided with her husband until his commitment, and at that time the five years' residence was not completed. If the husband be supposed to have returned to his wife, and the order to have been applied for to remove him, he would not have been irremovable by reason of five years' residence, because an imprisonment in another parish on a criminal charge, ending in a conviction and long imprisonment and transportation, is a break in the residence (*Reg. v. Salford*, 12 Jur. 790). The effect of the proviso in 9 & 10 Vic. c. 66, s. 1, whether we look to 11 & 12 Vic. c. 111, or not, appears to us to be that the wife is removable if, under the circumstances, the husband, having come to her and become chargeable, would have been removable."

3. *Examinations* [*ante*, pp. 7, 8]—*Caption*.—The caption of an examination stated that the examinations were taken "touching the legal settlement" of the pauper (not stating any complaint): Held insufficient. *Reg. v. Inhab. of St. Thomas, New Sarum*, 17 Law Journ., N. S., Q. B., 339.

4. *Exceptional hiring*—*Not servant during whole period*.—A pauper was hired as a hewer in a colliery, from the 5th April, 1826, to the 5th April, 1827, to do such work as should be necessary for carrying on the colliery, and as he should be required to do by the owners, on the following (among other) terms:—Secondly, to be allowed during the whole period of his hiring, except one fortnight at Christmas, and in case of accident, as after provided, not less work than will yield him 28s. in each fortnight, the owners, if they should deem it expedient to work only nine days in a fortnight, being empowered to lay the pits off work for the other days. Sixthly, the owners to be at liberty to lay the pits off work at Christmas, for any term not exceeding ten working days; but he shall nevertheless continue, during such time, and during all other times that the pits shall be laid off work, the servant of the owners. Eighthly, that he shall, unless prevented by sickness or other sufficient cause, perform a full day's work on each and every working day, and, in default thereof, shall forfeit 2s. 6d. Held an exceptive hiring (*Rex v. Byker*, 2 B. and C. 114; *Rex v. St. Helen's Auckland*, 4 B. and Ad. 718, 724; *Reg. v. Cowper*, 5 Ad. and El. 161). *Reg. v. the Inhabitants of Walbottle*, 9 Q. B. Rep. 248; S. C. 10 Jur. 806; 2 New Spenc. Cas. 442; 15 Law Journ., N. S., M. C., 158.

Per Lord Denman, C. J.: "The case of *R. v. Gateshead* (2 B.

and Cres. 117, n.) must decide this, unless the more general words in the sixth clause should make the party a servant at all times during the period of the contract. At first they create that impression; but, upon consideration, it is quite clear that they do not refer to the whole period of the contract, but only to Christmas, and when the pit shall be laid off work. At first it would be taken for granted that the pit must be either at work or not during working days, but the case finds that, during the ordinary working days, it is not laid off work, and, therefore, during certain hours of those days, there is such an exception as there was in *R. v. Gateshead*."

5. *Settlement—Measurement of the ten miles under 4 & 5 Will. 4, c. 76, s. 68.*—The stat. of 4 & 5 Will. 4, c. 76, s. 68, enacts that no person shall retain a settlement gained by possessing an estate or interest in a parish for a longer time than he shall inhabit "within ten miles thereof:" Held, where the pauper resided out of the parish, that the words mean ten miles measured in a direct line from the residence to the nearest point of the parish. *Reg. v. Inhab. of Saffron Walden*, 9 Q. B. Rep. 76.

Per Denman, C. J., "Some statutes furnish one mode of measurement, some another. In *Leigh v. Hind* (9 B. and Cres. 774) B. Parke thought the natural mode of estimating the distance was as the crow flies; but here, with reference probably to the object of the contract, the measurement by the nearest accessible route was adopted. Here we are left very much at large, and without materials for judgment. * * Abstractedly, the most reasonable rule appears to be that approved of by my brother Parke, namely, a measurement by a direct line."

6. *Order of removal—Jurisdiction—Practice as to quashing orders on Certiorari.*—An order of removal having "borough of D." in the margin, reciting a complaint of the overseers of a parish in the borough of D. to R. and K., "being two of her Majesty's justices of the peace having jurisdiction within and for the said borough," and not otherwise showing that the order was made within the jurisdiction, is bad. And the court quashed the order, and an order of sessions affirming it, the two being brought up by a certiorari granted in the first instance, and without a rule to show cause, by fiat of a judge at chambers. *Reg. v. Newton Ferrers*, 9 Q. B. Rep. 32.

Per Lord Denman: "If *Rex v. Chipping Sodbury* (3 Nev. and Man. 104) be rightly reported, we are disposed to think that we did not do right there." As to the objection that the place where the complaint or order was made did not appear, and that the order was bad, his lordship said: "That in our opinion *Reg. v. Stockton* (7 Q. B. 520) does not interfere with our view; we there required the word 'in' for the purpose of having it shown

that the order was made locally within the jurisdiction. But here the word 'within' is not connected with the allegation of complaint."

7. *Hiring and service—Apprenticeship—Hiring and not imperfect contract of apprenticeship—What not exceptive hiring.*—By written agreement between W. and B. (B. not appearing to be connected with any other party to the agreement except by its terms) of the one part, and O. of the other part, W. agreed to hire and O. to be hired for three years to dress silk. For the first three months from the commencement of O.'s working under the agreement, he was to receive 10s. per week; after that time to dress silk on a frame at 2½d. per pound for foreign waste, and 3d. per pound for home waste, provided he dressed seventy-two pounds of foreign waste for double yarn, and sixty pounds of home waste for single yarn, per week. For all he did over and above the said weights of waste he should receive, for foreign waste, 4d. per pound, and for home waste 4½d. per pound; and for what his work averaged short of the above-mentioned weights of seventy-two pounds and sixty pounds per week, he should be subjected to be deducted or abated 4½d. and 4d. per pound for each description of dressed waste deficient of the aforesaid weekly quantity. And B. should receive of W. 6s. per week for superintending and instructing O. in the best manner he was capable, to make him a competent workman, B. to be answerable for the work being done in a proper manner. B. was to receive 4d. per pound for foreign waste, and 4½d. per pound for home waste, for his own work during the time of the agreement. Held, 1st, that this was a contract for the hiring of O., and not an imperfect contract of apprenticeship; 2nd, that it was not an exceptive hiring. *Reg. v. Inhab. of Northorram*, 9 Q. B. Rep. 24.

Per Lord Denman: "As to the question whether it is merely an imperfect contract of apprenticeship, the court has in former times seemed to treat contracts as if a hiring, which included a teaching, ceased to be a hiring under which a settlement could be gained by hiring and service. But I do not see why there should not be both a hiring and a contract to learn and teach; the one may exclude the other, but does not necessarily do so. Now, here we have, first, a distinct contract of hiring; then comes a contract that B. shall teach; but I think that the contract had a hiring in view."

POOR-RATES.

1. 6 & 7 Will. 4, c. 96, s. 1—*Brickfield—Rent—Royalty.*—On appeal against a poor-rate by the occupier of a brickfield, a case was stated showing that the appellant held the land (ten acres) for the purpose of getting from it clay to make bricks, under a lease for seven or fourteen years, or till the earth should be all dug out; that

he paid £2 per acre without reference to the use made of the land, and a royalty of 1s. 6d. for every thousand of bricks moulded in any one year; that the value of land in the parish let for general and agricultural purposes was £2 6s. a year; that the appellant had on the field four brick-making "stoals," each stool capable of producing 750,000 bricks; that the field originally contained sufficient clay for 31,000,000 bricks; that in the year before the rate was laid the appellant had made nearly 3,000,000, and there remained clay enough for 12,000,000. The sessions also found that the rent which a tenant would have been willing to pay on taking a lease of the premises, with liberty to consume the brick earth, and without being liable to royalty, was £10 per acre, and they confirmed the rate, by which the appellant was assessed at £2 6s. per acre, and for royalty at 1s. 6d. per thousand on as many bricks as the stools were capable of producing in a year: Held that the rent, estimated according to stat. 6 & 7 Will. 4, c. 96, s. 1, was the proper criterion of the rate on this property; and, assuming the above facts to have appeared, without any specific finding as to the rent which a tenant would be willing to pay, that the royalty, together with the fixed annual charge, was properly considered as the rent; that the payment in respect of the brick earth was not the less a rent because the subject matter of the renting was in a course of being wholly consumed; that, in absence of proof to the contrary, the sessions were right in assuming the number of bricks which the stools could make to have been actually made within the year of rating; that the rate was properly assessed on the number supposed to be made in the particular year; and that no deduction was to be made for the breeze, ashes, and other materials used in making the bricks, it being presumed that these were allowed for in fixing the royalty. But held, further, that the sessions having found specifically the sum which a tenant, in their opinion, would give on taking a lease with liberty to consume the earth, and without royalty, viz., £10 a year per acre, that sum (from which tenants' rates and taxes were to be deducted) must be considered as the rent within the meaning of stat. 6 & 7 Will. 4, c. 96, s. 1, and no inference from other facts was admissible, and the Court of Queen's Bench ordered the rate to be amended accordingly. In another case, not materially differing, but in which the sessions neither expressly stated the rent which, in their opinion, a tenant might reasonably be expected to pay, nor gave data for estimating it, except by stating the number of stools at work, and the amount of royalty actually paid (under an agreement still subsisting) in the five years immediately before that for which the rate was made; and the question propounded was, "What is the net annual value of the land?" Held, that the fixed sum paid for occupation and the royalty constituted the rent; but that the court

could not determine the amount which, at the time of making the rate, a tenant about to take a lease might reasonably be expected to pay; nor, in the absence of materials for such estimate, could the assessment be grounded on the ordinary amount of rent paid for land in the parish used for agricultural purposes, or the amount paid for the best garden ground in the parish; the court sent the rate back to the sessions to be amended according to the principles laid down in the preceding case. *Reg. v. Westbrook, Reg. v. Everest*, 10 Q. B. 178.

In *Westbrook's* case, Lord Denman said that, though the facts of *Rex v. Mirfield* (10 East, 219), were quite different, yet "the principle of that decision is in accordance with what will be our conclusion. As to the objection that the royalty is paid not for the renewing produce of the land, but for several portions of the land itself, mixed up with foreign matter, the parish officers have done right in considering the royalty as part of the rent; and we see no objection to the mode by which they arrive, *primâ facie*, at the conclusion that the amount of royalty reckoned in the rate will be paid in the year for which the rate is made."

2. *Waterworks Company—Distribution among parishes.*—The works of a water company extended into several parishes, and consisted of two portions, one of which, being the service-pipes which delivered the water to the consumer, was directly productive of profit, and the other, consisting of reservoirs, buildings, &c., indirectly conduced to such production; in some parishes the company had no works, but service-pipes; the rateable value for the purposes of poor-rate of the entire works was £30,800; the rateable value of the reservoirs, buildings, &c., valued as land and buildings deriving additional value from their capacity of being applied to the objects of a water company was £6,500: Held, that the rateable value ought to be apportioned among the several parishes in the following manner:—The rateable value of the reservoirs, buildings, &c., valued as above, to be first deducted from the total rateable value, and distributed among the parishes in which this portion of the works was situate, according to the extent of such works in each parish, and the residue of the rateable value to be apportioned among the parishes containing the service-pipes in the ratio of the net profits produced in each of those parishes. *Reg. v. Overseers of Mile End Old Town*, 10 Q. B. 208; S. C. 11 Jur. 988.

Per Lord Denman: "The apportionment is not at variance with the grounds of the judgment in *Reg. v. Cambridge Gas-light Co.* (8 Adol and El. 73). There the court decided that the parishes in which the profits are received are not entitled to all the amount produced by the rate, but that the parishes in which parts of the apparatus indirectly conducing to produce profit are

situate are entitled to a proportion. The court also declared that the principle upon which the sum of rateable value from the rates of all the parishes should be apportioned is the same as that which had been applied to canals. By the method adopted in this case, the rateability of the portion of the apparatus indirectly conducting to produce profit is provided for, and the residue of the sum of rateable value is apportioned to those parts of the apparatus directly producing profit, in analogy to the mileage proportion for canals and railways."

3. *Warrant including costs bad* [but see v. 1, N.S., p. 173]—*Backing warrant under 24 Geo. 2, c. 55—Trespass against justice's constable—Demand of warrant.*—The 43 Eliz. c. 2, s. 4, does not extend to costs; where, therefore, a warrant of two justices of the county of S. commanded the constable to apprehend and take A. B. to the House of Correction, there to remain until payment of a sum made up of the arrears of poor-rate due from him and costs awarded: Held, that such warrant was altogether bad, and that an action of trespass lay against the justices and the constable for the arrest and imprisonment under it. The backing of such a warrant by a magistrate under 24 Geo. 2, c. 55, is merely a ministerial act, and the justices who originally issued the warrant are responsible for the arrest under it, although made in a different county from that in which it was issued. Where a party arrested under such warrant paid under protest the whole amount mentioned therein, he was entitled, in an action of trespass brought for such arrest, to recover as damages the whole amount so paid by him. Under the 24 Geo. 2, c. 44, a demand of the perusal and copy of the warrant under which a constable has acted, which is in writing, and signed by the plaintiff's attorney, is sufficient, although it has been left at the constable's place of abode by a person other than the attorney. When, previous to such demand being made, the plaintiff has by other means obtained a copy of the warrant, this does not excuse the constable from complying with the demand, if he seeks to avail himself of the protection given by that statute. The mere fact of the justices who issued the warrant being sued jointly with the constable, does not entitle the latter to a verdict, the last clause of the 24 Geo. 2, c. 44, s. 6, only applying to actions brought after the demand of the perusal and copy of the warrant has been complied with by the constable (*Clark v. Woods*, 12 Law Journ., N. S., M. C., 189).

Mr. B. Rolfe said: "Secondly, it has been contended that the warrant was only executable in S., and that the magistrates were not liable for its execution out of their jurisdiction; but, if a bad warrant, what is there to make it executable only in Sussex? In such case it only amounts to an authority to the constable to take

the plaintiff without any right to do so. But, in truth, a magistrate who issues a warrant must be taken to know the law, that such a warrant may be enforced in any county of England upon its being indorsed in the manner required by the statute. Such indorsement is merely ministerial, and in no measure lessens the responsibility incurred by issuing the warrant in the first instance." As to levying costs of obtaining distress warrant for poor-rates, see 12 & 13 Vic. c. 14; 1 Law Mag., N. S., p. 173.

4. *Waterworks—Public purposes.*—Stat. 7 & 8 Geo. 4, c. lxxxiv., and 8 & 9 Vic. c. lxx., empowered commissioners to construct two reservoirs in the township of L., one for the supply of water to the town of Huddersfield, the other to prevent injury to certain mill-owners in L., who had rights in the water intended to be diverted for the use of the inhabitants of Huddersfield. By sect. 81 of stat. 7 & 8 Geo. 4, c. lxxxiv., which regulated the rates at which water was to be supplied, the commissioners were not obliged to furnish such supply to any inhabitants for less than 12s. in any one year. By sec. 88, in case of fire within the town or neighbourhood of Huddersfield, the water was to be used without any satisfaction being made for it. By sec. 73 the money raised by the commissioners was to be applied in making and maintaining the reservoirs and waterworks. By sect. 74, when any surplus arose, the water-rates were to be reduced, so that the proceeds should only cover the current expenses attending the execution of the powers of the act. The commissioners constructed the reservoirs and waterworks, and applied the water-rates in pursuance of those statutes. The mill-owners had never paid any rent or consideration to the commissioners in respect of the compensation reservoir. Held, that the commissioners were liable to poor-rate in L. for the reservoirs and apparatus in that township. *Reg. v. Churchwardens, &c., of Longwood*, 13 Jur. 170.

Per Lord Denman, C. J.: "As the statutes from which the commissioners derive their right of occupation do not allow to them any individual profit or benefit, there is the semblance of a ground for claiming this exemption; but when the purposes are considered for which those statutes were obtained, this semblance disappears, and the property is found to be rateable. The main purpose is the supply of water to that portion of the inhabitants of a particular township that will pay not less than 12s. per annum for it. A further purpose is the prevention of fire in the same township, the benefit from which is confined principally to the owners of combustible property therein. There are no decisions that purposes analogous to these are public, and *Reg. v. Badcock (trustees of Taunton Market)*—(6 Q. B. Rep. 787; 9 Jur. 250)—is a decision to the contrary. If private speculators had in-

vested capital for the supply of water at a profit, and had so become the occupiers of the premises in question in Longwood, they would have been rateable (*Reg. v. the Inhabitants of Mile-end Old Town*, 11 Jur. 988), and the money paid for the rate would be part of the cost of the supply, and would fall on the consumer. The private acts enable a portion of the inhabitants, by commissioners, to obtain the supply without the intervention of a water company; but, as far as respects the rights of other townships, this portion of the inhabitants, by their commissioners, stand in the position of an ordinary water company, and have no greater right to exempt from rateability a portion of land in Longwood, and so to obtain water at a less cost, than such a company would have had."

POST-OFFICE.

Secreting letters—Larceny—Causa lucri.—A. was indicted for stealing two post letters in the post-office, where he was employed as a servant. There was also a count charging him with secreted the letters, under 7 Will. 4, and 1 Vic. c. 36. The jury found that the prisoner, having committed a mistake in the sorting of certain letters in the post-office, secreted them, in order to avoid the supposed penalty attached to the mistake: "Held, that this secreted was within the 26th section of the statute, and [that a larceny also was proved. *Reg. v. Wynn*, 13 Jur. 107.

Per Lord Denman, C.J.: "As to secreted, I have no doubt on the subject. The act of Parliament is very clear. A most important trust is reposed in all persons employed in the post-office, and they are not placed by the law on the same footing as common thieves. The statute says that they shall not secrete letters for any purpose whatsoever, and meant to take in this class of offences. The case of *R. v. Douglas* (16 Law Journ., N.S., M. C., 117), confirmed in error, shows that where the statute says 'for any purpose whatsoever,' it is unnecessary to state any purpose. For what purpose the letters were secreted is, therefore, immaterial. I am also clearly of opinion that a larceny is proved. We find a man in a private place taking letters, dropping them for a purpose of his own, depriving the owner of his property, putting it in a place from which in all probability it would disappear in a moment. He wanted to avoid the penalty to which he was liable. An asportation took place the moment he released his hold of the letters."

QUO WARRANTO.

1. *Constable.*—A quo warranto lies for the office of constable. *Key. v. Booth*, 13 Jur. 6.

[See *Rex v. Goudge*, 2 Strange, 1213.]

2. *Specifying objections in rule nisi.*—It is not sufficient com-

pliance with Reg. Gen. Hil. Term, 7 & 8 Geo. 4, which requires that in quo warranto informations the objections intended to be made to the title of the defendant shall be specified in the rule to show cause, to state in the rule that the defendant was not entitled to be appointed, and that the relator was. *Reg. v. Edye*, 13 Jur. 8.

Per Lord Denman: "The objection appears to us to be quite insufficiently stated in the rule. There should be something to point the defendant to the specific ground upon which his title to the office is questioned."

REGISTRATION.

1. *Births, deaths, and marriages—Entire false entry.*—The 6 & 7 Will. 4, c. 86, s. 41, makes it a misdemeanor to make a false statement of one or more of the particulars required to be registered for the purpose of being inserted in any register of birth, death, or marriage; and to constitute this offence the purpose need not be effected. But it is a felony, under sect. 43 of that statute, to cause the registrar to make an entire false entry of birth, marriage, or death. *Reg. v. Mason*, 2 Car. and K. 622.

2. *Births, deaths, and marriages—False entry—Evidence—Register books.*—An indictment, under 6 & 7 Will. 4, c. 86, s. 41 (Registration of Marriages Act), charged, that a clergyman had solemnised a marriage, and was about to register in duplicate the particulars relating to the marriage, and that the defendant did wilfully make to the said clergyman, "for the purpose of being inserted in the register of marriage," certain false statements. The proof was, that the particulars were entered by the clerk of the church before the marriage; that after the marriage the clergyman asked the defendant if they were correct, and that he answered in the affirmative, and the clergyman signed the registrar: Held, that the defendant was rightly convicted. *Reg. v. Brown*, 2 C. and K. 504; S. C. 17 Law Journ., N.S., M. C. 145. Held, also, that it was not necessary, upon an indictment under the act, to prove that the register books used by the clergyman were furnished to him by the Registrar-General (*Ibid.*).

ROBBERY.

1. *Assault.*—A., B., and C., were indicted for having robbed and beaten D. A. knocked D. down, and it was imputed that B. and C. stole the property from his pockets: Held, that if B. and C. stole the property, and A. did not participate in the robbery, A. could not be convicted of an assault, as the assault committed by him was an independent assault, unconnected with the robbery; but that, if the jury thought that D. was not robbed by any of the prisoners, but had been assaulted by all of them, they might find all guilty of the assault. *Reg. v. Barnett*, 2 Car. and Kirw. 594.

2. *Assault.*—A. being indicted for a robbery, the jury acquitted

him of the robbery, and found him guilty of a common assault only : Held, such conviction right under stat. 1 Vic. c. 85, s. 11. *Reg. v. Birch*, 1 Den. C. C. R. 185.

The judges (on a reserved case) considered the several authorities referred to in Mr. Greaves' edit. of Russell's Crim. L. (v. 1, p. 778, and note, p. 782), and they were unanimously of opinion that the prisoner was properly found guilty of an assault on the indictment, which in fact contained a charge of an assault expressly, and was not merely for robbing the prosecutor. After referring to s. 11 of 1 Vic. c. 85, the judges thought that this enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. But they were of opinion that, in order to convict of an assault under s. 11, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment. And it was suggested that it would be prudent that all indictments for felony, including an assault, should state the assault in the indictment.

SURVEY OF PARISH.

Orders of Poor Law Commissioners—6 & 7 Will. 4, c. 96, s. 3—*Illegal rules and rates*—*Certiorari*.—Under the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, s. 3, the Poor-law Commissioners having, by order directed to the guardians of a union, ordered that a survey of a parish within the union should be made, and the money provided for by a charge on the rates of the parish ; and the guardians having ordered the officers of the parish to make a separate rate for raising the required sum : Held that the order of the guardians was bad, because, if the statute gave them power to choose in which of the two modes payment should be made, then the order of the Poor Law Commissioners was invalid, as illegally directing payment in one mode, and the guardians were therefore making an order of their own authority, which they could not do. *Quere*, whether under this section the order of the Poor-law Commissioners that a survey should be made ought not to be addressed to the guardians, parish officers, and other officers from whom the "representation" mentioned in the first part of s. 3 proceeds. *Quere*, whether the words "as they may see fit" in this section refer to the Poor-law Commissioners or the guardians. *Quere*, whether, under stat. 4 & 5 Will. 4, c. 76, s. 105, rules bad in themselves, but not removed by *certiorari*, must be obeyed ; or whether that section only provided that rates removed by *certiorari* must be obeyed until they have been declared illegal by the Court of Queen's Bench. *Reg. v. Overseers of Banger*, 10 Q. B. 91.

TREASON.

Indictment—Form of caption—Joint and several commission—Treason compassing the Queen's death—Delivery of list of witnesses to prisoner ten days previous to trial—Challenges—Form of allocutus—Statutes 36 Geo. 3, c. 7; 57 Geo. 3, c. 6; 11 & 12 Vic. c. 12.—On an indictment for treason, it was held, Crampton, J., *dissentiente*, that the prisoner claiming the benefit of a certain statute, not complied with, was entitled to raise that question by a plea of a declinatory nature. Where the caption stated that, "by virtue of a commission under letters patent, bearing date, &c., and directed to A. B., C. D., and E. F., and others, in said letters named, &c. Held, that the commission was not a joint one, and that the three persons named had full power to act without the others. Held, that the 10 Hen. 7, c. 2, extended the provisions of the 25 Edw. 3 to Ireland; and made it treason to levy war there. Held, that the first and fourth sections of the 57 Geo. 3 do not extend to Ireland, and that, as the prisoners were not indicted under the 11 & 12 Vic. c. 12, they were not entitled to the benefit of that act. Held, that the word "treason," without any other word or qualification attached to it, meant high treason, and the prisoner, therefore, was entitled to but twenty peremptory challenges (9 Geo. 4, c. 54). Held, that the allocutus was sufficient where the prisoner was asked why *tho* said, &c., "should not proceed to judgment." *O'Brien v. Reg. in error*, 1 Ir. Jur. 169, 249.

Per Wilde, C. J. (for Judges in House of Lords): "I am authorised by the learned judges to report their unanimous opinion that the errors assigned have not been maintained by the arguments urged at your lordships' bar. As to the *first* objection, the judges are of opinion that the allegation upon the record that the three judges who executed the commission in relation to the trials of the several plaintiffs in error, were nominated and appointed to execute that commission, is an affirmative allegation of their authority to perform that duty, and that it is in no respect rendered uncertain or ambiguous by the subsequent statement that the commission by which they were so authorised, nominated, and appointed, was directed to them and others. The *second* objection involves two points—first, whether the plaintiffs in error, in respect of the sixth count of the indictment, were entitled to have a copy of the indictment, a list of the witnesses, and a list of the jury ten days before the trial, under the provisions of the statute of Will. 3 and the statute of Anne. Secondly, whether, if they were so entitled, the objection founded upon the non-compliance with the provisions of these statutes was matter properly urged by plea. The judges are of opinion that the plaintiffs in error were not entitled to have delivered to them the lists and copies referred

to in the error assigned in that respect, and therefore it becomes unnecessary to consider whether the objection was properly urged by plea. The right of the plaintiffs in error to be furnished with the copy of the indictment and the lists referred to has been endeavoured to be sustained by the counsel for the plaintiffs in error at the bar upon two grounds—first, upon the ground that the statute of the 36 Geo. 3, c. 7, extended to Ireland; secondly, or that, if that statute did not originally extend to Ireland, it was afterwards so extended by the operation of the 57th Geo. 3, c. 6, and by the 11 & 12 Vic. c. 12. The judges are of opinion that neither of these grounds can be supported. The statute of the 36 Geo. 3 passed before the Union, and did not bind Ireland, and therefore, if it has any application to Ireland, it must be by the effect of 57 Geo. 3, or 11 and 12 Vic. The 1st section of 36 Geo. 3, c. 7, enacted that certain acts during the life of his Majesty, Geo. 3, and until the end of the next session of Parliament after a demise of the Crown, should be deemed treason; and the 1st section of the 57 Geo. 3, c. 6, made these provisions perpetual, but did not extend the operation of the statute of the 36 Geo. 3 to Ireland. The 4th section of 57 Geo. 3, cap. 6, has been principally relied upon, which expressly gives the benefit of the 7 & 8 W. 3, and the 7 Anne, cap. 21, to persons accused of any treason made or declared by that act of the 57 Geo. 3; and it is enough to say that the charge in the sixth count is not for any treason made or declared by that statute. With regard to the statute of the 11 and 12 Vic., the only effect of that statute was to extend to Ireland certain of the provisions of the 36 Geo. 3, made perpetual by the 57 Geo. 3, and the 4th sec. of the 57 Geo. 3, which has been relied upon, is limited to treason, made or declared by that act; and the treason which is the subject of the sixth count was not one of them, and to which, therefore, it does not apply. As to the objection that the counts charging the levying of war in Ireland do not charge an offence which in point of law amounts to treason, this objection depends upon the construction of the statute of Henry 7, passing by the name of Poyning's Law. By that statute we think that those acts which were treason in England by the statute of Edward 3, were made treason in Ireland if committed there, and we cannot deem it necessary to say more upon the subject than that the terms of the statute admit of no doubt. As to the objection to the allocutus, we think it is in the proper form. All that the prisoner in that stage of the proceedings can properly be asked is, what has he to say why judgment should not be pronounced; and as to precedents which go further, we deem the matter beyond the question stated to be surplusage. The only remaining error assigned refers to the

challenge of the jury. That error has not been urged at your lordships' bar, and we think it was very properly abandoned, as the question is not open to any doubt, the language of the statute of 9 Geo. 4 being clear and unambiguous."

WORKHOUSE.

Order for building—Majority of guardians—Costs on showing cause in first instance.—Where, by order of the Poor-law Commissioners, under stat. 4 & 5 Will. 4, c. 76, s. 39, guardians are appointed to administer the poor-law in a single parish, the consent to an order for building a workhouse in such parish, under sect. 23, must be given by a majority of the guardians, as it is in the case of a union, under sect. 38, and not by a majority of the rate-payers. Where the Poor-law Commissioners, under the privilege given by stat. 4 & 5 W. 4, c. 76, s. 106, show cause in the first instance against a motion for a certiorari and succeed, the court will grant them costs, if proper ground appear for it, though the general rule of practice is that a party showing cause in the first instance shall not have costs. *Reg. v. Poor-law Commissioners, in re St. Mary Abbots, Kensington*, 9 Q. B. 291.

APPEAL [*ante*, p. 1].

1. *Order of removal—Time for appeal—Entry and respite—Mandamus* [*ante*, p. 5—7]—*Costs of motion for mandamus and writ*
Appellants against an order of removal are entitled to enter and respite the appeal at the sessions next following the order, without giving order, though more than thirty-five days (stat. 4 & 5 Will. 4, c. 96, ss. 79, 81) have elapsed between the receipt of the order and the holding of the sessions, and to have the appeal tried, upon notice, at the next session after. The sessions having refused to hear an appeal because more than thirty-five days had elapsed between the receipt of the order and the next sessions, the Court of Queen's Bench granted a mandamus calling upon them to enter continuances and hear; and, the writ having been obeyed, costs were granted to the appellants on motion, though the respondents, in opposing the rule nisi for a mandamus, supported a judgment of the session in their favour; and though the appellants ultimately succeeded, not on the question of settlement, but on the omission of the respondents to send with the examinations a document referred to in them. *Reg. v. the Justices of London*, 9 Q. B. 41.

Per Lord Denman: "It has always been understood that no notice is the same as no reasonable notice; and that if no notice

has been given of trial at the first practicable sessions, and they are the sessions next after the order, and the appeal is then entered, the court of sessions is bound to adjourn it. As to the costs, I think that there is nothing to take this case out of the ordinary rule. It is true that, when the appeal first came on, the respondents had the decision of a learned person in their favour, but that does not prevent the application of the rule when a *mandamus* is moved for and granted after cause shown."

2. *Dismissal of appeal for non-production of original order—Appeal after subsequent removal.*—At the hearing of an appeal against the removal of a pauper, the respondents objected that the appellants could not be heard, the original order not being produced, and no notice to produce it having been served; the sessions dismissed the appeal. Subsequently the pauper was removed, and the appellants appealed to the next quarter sessions, but the court refused to entertain the appeal. Upon motion for a *mandamus*: Held, first, that the first appeal was properly dismissed, the practice of the court requiring the production of the original order; and, secondly, that there was no right of appeal upon the subsequent removal of the pauper. *Reg. v. the Justices of Peterborough*, 18 Law J., N. S., M. C., 79.

APPRENTICE [*ante*, p. 11].

1. *Evidence of order for binding parish apprentice—Signature of justices.*—On appeal against an order of removal, the respondents alleging a parish apprenticeship, and ground having been laid for the reception of secondary evidence, the respondents produced the register books of parish C., which contained an entry in the form prescribed by 42 Geo. 3, c. 46, s. 1, stating that, on 7th April, 1823, W. S., aged, &c., son of, &c., was bound apprentice to R. B., farmer, residing, &c., until the age of twenty-one, by the overseers of C., who were named. In the last column were the words, "Magistrates assenting, J. H., L. St. A.," which appeared to be the actual signatures of magistrates so named. The apprenticed party, in his examination, deposed that he was bound apprentice by the overseers of C., and stated the other particulars relating to himself, as given in the register. The sessions held, on objection taken, that the examinations did not contain sufficient legal evidence of the apprenticeship, because they did not show that the justices had made any order for the binding, as directed by stat. 56 Geo. 3, c. 139, s. 1, though in the opinion of the sessions it did appear that the justices had allowed, by signing and sealing, an indenture which recited an order, and they quashed the order of removal, subject to a case, which put the question whether sufficient legal evidence of a parish apprenticeship appeared in the examinations: Held, that the signature of the justices

would have been evidence of an assent under stat. 42 Geo. 3, c. 46; but that the sessions could not presume from the facts and documents an order or an allowance by the justices, pursuant to stat 56 Geo. 3, c. 139, s. 1. *Reg v. Inhabitants of East Stonehouse*, 10 Q. B. 230.

Per Denman, C. J.: "The entry was obviously made in obedience to the 42 Geo. 3, c. 46, which requires the register to be kept, and gives the form, the last column of which is headed 'Magistrates assenting,' with the words underwritten, 'to be signed by themselves;' the object of this part of the register being to preserve a record of the particular justices with whose assent any particular apprentice was bound. This entry, therefore, in a case where secondary evidence was admissible, would on general principles, and without reference to the provisions of the third section of the statute, have been evidence of the fact that these two justices had assented to the binding; that the book had been presented to them at the time of their assenting; and that they had then signed their assent; for the entry purports to have been made in compliance with the requisitions of the statute, and, therefore, in the case of public functionaries, there would be the ordinary presumption that they had done so. But it is now sought to carry this presumption much farther, and, because the justices appear to have complied with the requisitions of one statute, it is to be inferred that they must have complied with the very special requisitions of another."

2. *Evidence of order for binding parish apprentices and allowance of indenture—Examinations*—[see 11 & 12 Vict. c. 31].—To prove before a removing magistrate that the pauper was bound apprentice by parish officers under stat. 56 Geo. 3, c. 139, it is not sufficient to put in the indenture itself, and verify the attestation; the order for binding and the allowance of the indenture must also be severally proved; and a due making, so proved, of such order and allowance, must appear by the examinations sent with the copy of order of removal. *Reg v. Inhabitants of Chiswick*, 10 Q. B. 241, n.

3. *Parish apprentice—Reference to order for binding—Allowance of indentures—Notice of appeal, signature by overseers*.—A notice of appeal, signed by eight overseers of the poor of a township in a borough, the justices of which were empowered to appoint one or more additional overseers for the township, should be intended to be signed by a majority. An indenture of apprenticeship purported to be made "with the consent and approbation of two justices of the West Riding, whose names are hereunto subscribed;" and the allowance was, "We, two justices in and for the West Riding, in confirmation of our order, under our hands and seals, bearing even date herewith, do hereby assent to the binding, and sign our allow-

since hereof, before the same is executed by any of the other parties hereto:" Held, first, that it appeared that the justices were in the West Riding when they signed; secondly, that the order for binding was duly referred to in the indenture, within sect. 1 of stat. 59 Geo. 3, c. 139. *Reg. v. Aldborough*, 18 Law Journ., N. S., M. C. 81; S. C. 13 Jur. 322.

Per Denman, C. J.: "The last objection is, that the order is not referred to by its date in the indenture; the allowance, which contains what is required, being said to be not in the indenture, and a reference in the indenture to the allowance not making it a part thereof; and *Bex v. Bawbergh* (2 B. and C. 222) was relied on; but it appears to us that that case is inapplicable; for there the date of the order was not referred to upon the instrument at all—here it is. The essential fact, therefore, of that case is absent from this. Upon principle, also, it appears to us that the objection fails. If the allowance is in the indenture, the reference to the date which is in the allowance is also in the indenture; for the reference to the date of an order being equally effectual on whatever part it may be written, and not being the act of any one in particular, the place where it may be found within the four corners of the instrument ought not to affect its validity. If the parties procured it to be written before they executed the deed, whether the writing was above or below the seal, whether on the side or the back, and whether the language of the reference purported to be that of all who seal or of one only, or of another person, and to be adopted by them, the statute would be complied with. It is almost superfluous to cite authorities to show that all that is written on the instrument, according to the intention of the parties before execution, constitutes the deed, and that matters subscribed or indorsed may be incorporated. *Broke v. Smith* (Moo. 679) is in point, and the doctrine has been uniformly acted on since."

ASSAULT.

Conviction under 9 Geo. 4, c. 31, s. 27—Penalty, to whom payable.
—By the 9 Geo. 4, c. 31, s. 27, power is given to two justices, in cases of assault, to impose upon the offender a fine not exceeding £5 "to be paid to some one of the overseers of the poor, or to some other officer of the parish, township or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division in which such parish, township, or place shall be situate;" and sect. 35 provides that the conviction may be drawn up in a given form, or in any other form of words to the same effect; Held, that a conviction, by which the penalty was ordered to be paid "to the treasurer of the county of C., in which the said offence was committed, to be

by him applied according to the directions of the statute, &c., or the party in default to be imprisoned for two months, &c., was bad; and that the justices were liable in trespass for the imprisonment of the party under it. *Chaddock v. Wilbraham*, 5 C. B. 645; S. C. 3 New Sess. Cas. 227; 12 Jur. 136.

BASTARD—[ante, p. 2—4].

1. *Statement in order that evidence given "in presence and hearing."*

—An order in bastardy for the payment of expenses of the maintenance of an illegitimate child, under the 7 & 8 Vict. c. 101, and 8 & 9 Vict. c. 10, whether the defendant appears in person, or by attorney, to answer the complaint of the woman before the justices, should state on the face of it, that the evidence was given "in the presence and hearing" of the defendant, or of his attorney, as the case may be; and if after appearance there is any special reason for omitting that statement, it should be suggested on the face of the order. Where, in an order drawn up on a printed form under the 8 & 9 Vict. c. 10, it was stated that the putative father appeared before the justices in pursuance of the summons; but the words "in the presence and hearing of the said," &c. (after the statement of the proof being given and the evidence received) were struck out: Held, on motion for a certiorari, that the order was bad, and that the court would not presume, these words being struck out, that the proof and evidence were, nevertheless, received and given in the presence and hearing of the putative father, or of his attorney. *Reg. v. Grafton*, 5 Dowl. and Lownd. 568.

Per Wightman, J.: "It seems to me, looking at the two statutes, and the forms in the schedule to the 8 & 9 Vict. c. 10, with the notes to those forms, that whether the defendant appears in person or by attorney to answer the complaint of the woman before the justices, the order ought to state on the face of it, that the evidence was given 'in the presence and hearing of the defendant, or of his attorney,' as the case may be; and that if there is any special reason for omitting that statement, after appearance, it should be suggested on the face of the order."

2. *Child born abroad.*—The putative father of a bastard child, born abroad, of a foreign mother, cannot be forced, by an order of justices, made under the statute 7 & 8 Vict. c. 101, sect. 3, to pay to the mother a weekly sum of money for the maintenance of the child. *Reg. v. Blanc*, 13 Jur. 854.

Per Coleridge J.: "The 3rd. sect. of the stat. 7 & 8 Vict. c. 101, is part of a system regarding bastard children, lately introduced by the Legislature, in substitution of a former system. In order to construe the latter, we should look at the former. Upon so doing, it will be seen that the very first condition, always contemplated by the Legislature, has been, that the child was born in

the parish. In the stat. 18 Eliz. c. 3, it is said to be concerning bastards begotten and born out of lawful matrimony, the said bastards being now left to be kept at the charges of the parish *where they be born*. It is the same in all the subsequent statutes. But to speak of a child being born in the parish is the same thing as to say it was born in England. It seems clear to me that the Legislature, in the latest statutes, has been dealing with the same sort of bastards with which it was always dealing, namely, those born in England, so as to bring probably a burthen on the parish. The Legislature, in using the word "bastard," must be taken to have intended, bastard with the incidents and according to the rules of English law. It could not have been intended that the justices should inquire whether a child, born abroad, of a foreign mother, was a bastard or not. If it be bastard, and born abroad, it has no settlement, and is therefore no burthen in England. I am of opinion that this order, which states that the child in question was born abroad, a bastard of a foreign mother, is bad on the face of it, and not within the statute. As to the question of humanity, there are always two sides to it, and courts of justice cannot enter upon it."

3. *Order of maintenance—Statement of evidence in order—"On oath."*—An order in bastardy, commencing "Whereas S. (the putative father) having been duly served with the said summons," &c., "and now appearing in pursuance thereof," proceeded as follows: "And it being now proved to us in the presence," &c., "of the attorney attending on behalf of S." (that the child was born a bastard, &c.); and we having in the presence, &c., "of the said attorney," &c., "heard the evidence of" (the mother) "and no evidence having been tendered on behalf" of S., it then adjudged S. to be the putative father: "Held, sufficient, since the 8 & 9 Vict. c. 10: Held, also, that the form of order given in the schedule of that act does not require it to be set out that the evidence was given on oath. *Reg. v. Shipperbottom*, 10 Q. B. Rep. 514.

Per Denman, C. J.: "On looking at the form given by the 8 & 9 Vict. c. 10, Sched. No. 8, my brother Patteson remarks that, in the latter part of it, to the words "and having also heard all the evidence tendered by the said" (blank) this note is appended: "Should the defendant appear by attorney or counsel, it will be then only necessary to erase the word 'by', and add 'on behalf of.' " And, in the order now before us, these words are accordingly put in their proper place. The form, therefore, clearly recognises that the defendant may appear by attorney. If so, although the form has not been adapted to the appearance by attorney in that earlier part of it which is now attacked, we must

consider that it is sufficiently followed, if the necessary alteration has been made elsewhere, to express such appearance."

BASTARDY.

1. *Order of affiliation—Second application—Appeal to quarter sessions—Corroborative evidence.*—A woman applied for an order of affiliation to the justices of the petty sessional division in county A., and was refused. She subsequently removed into county B., and there made a second application, and the justices made an order, which, on appeal, was confirmed by the quarter sessions: Held, that as the petty sessions and the quarter sessions had general jurisdiction over the subject-matter, they were bound to hear and determine such second complaint; and that, although proof of the former application having been dismissed upon the merits would have been a good answer to such second application, neither the decision of the justices nor of the quarter sessions could be reviewed by the court of Q. B. Held, also, that upon appeal by the putative father the quarter sessions may confirm such order without requiring any corroborative evidence, if the appellant, after he has unsuccessfully taken objections in point of law, retires from the case. *Reg. v. Justices of Buckinghamshire*, 18 Law J., N. S., Mag. Cas. 113.

Per Wightman, J.: "When the second petty sessions received the application of a woman resident within their division, they were a tribunal having jurisdiction over the question. A former decision upon the merits in favour of the putative father was an answer to the application, provided it was made out by evidence. This evidence the petty sessions were bound to hear and decide upon. It is clear that they had jurisdiction to dismiss the application if the answer was proved. It follows that they had jurisdiction to grant the application and make the order if the proof in their estimation failed. At the quarter sessions the same principle applies."

2. *Order of affiliation—Petty session division—Petty sessions.*—By 7 & 8 Vict. c. 101, s. 2, an application for an order of affiliation must be made to a justice of the peace acting for the petty sessional division in which the woman resides, and the person alleged to be the father of the child must be summoned to appear at the petty sessional division in which such justice usually acts. In a late case an order in bastardy having the following caption: "At a petty sessions of &c., holden in and for the petty sessional division of H., in the said county at H. aforesaid"—set forth an application by a woman "residing at N., within this division," to a justice "acting for this division." It appeared that the justices who made the order were resident in the township of H., that they usually acted for divers townships in the neighbourhood, including the townships of N. and H.; that there was a petty sessional division called "the B.

division," within which several petty sessions were held, and one of them at H. The quarter sessions determined that, by the words "a petty sessions holden in and for the petty sessional division of H.," they understood the "petty sessions holden in and for the petty sessional division of B., holden at H.:" Held, that the order appeared to be made at a petty sessional division which did not exist, and was, therefore, bad. The practice of holding petty sessions at any place within the division of a county does not constitute it a petty sessional division. The quarter sessions ought to take judicial notice of the petty sessional divisions in their county. *Reg. v. Whittles*, 18 Law Journ., N. S., M. C. 96; S. C. 13 Jur. 403.

Per Denman, C. J.: "We cannot agree that in any sense, the loosest that can be given, do these facts warrant us in holding that any petty sessional division of Haslingden existed; and the fallacy on which the argument rested lies in confounding the holding of a petty session with the existence of a petty sessional division. Wherever two magistrates meet within the limits, and by virtue of their commission, and transact such a business as they are competent to transact there, they hold a petty session—if it be not a general quarter or special session; but the place in which they so meet, if they meet there ever so many times, does not thereby become a petty sessional division; nor by any act or acts of their own can they make it so, if such place be already within the ambit and parcel of a division already recognised. To this point the language of Bayley, J., in *Rex v. The Justices of Devon* (1 B. and Ald. 588), is very important. There it appeared that two magistrates, without the assent or knowledge of the other magistrates of an existing division, attempted to create a smaller one within it, and they had gone on holding sessions there for five or six years. Bayley, J., said (p. 592), 'The body of magistrates in a large division cannot be subdivided in this way; the subdivision should at least be made by the consent of the whole body at their petty sessions. For, if these two magistrates may thus subdivide themselves, any other two might do the same; and so the whole division might be separated into small districts, and great inconveniences might be produced.' This was said before the passing of the 9 Geo. 4, c. 43, and the argument is much stronger since the passing of that act; for that act provides a regular mode by which new divisions may be made, within which (by sect. 6) 'all matters and things which, by law, then were, or thereafter might be required to be or which then were usually transacted or determined within the division within which the same shall have arisen, or the parties therein concerned inhabit or exercise their trade or calling, and by or before one, two, or more justices of the peace dwelling or usually acting within the same, shall be transacted and

determined.' These words cannot be limited, in their construction, to the formation of merely special sessional divisions, and they certainly are not so limited in practice. If we are to look to the policy of the thing, few things can be more mischievous than to encourage the unauthorised formation of petty sessional divisions, to be attended by a small number of magistrates; but, as regards the case in hand, there seems no evidence that such a thing has been thought of or attempted. The two justices clearly thought themselves acting in and for the larger and recognised division; they had a right to hold their sessions for that division where they have held it; but they have, or their clerk has, made, in the particular instance, a mistake in the name of the division. When the bastardy acts speak of a division within which a person dwells, or a magistrate usually acts, they clearly speak of a district with some known limits; but who can say that here there is any division of Haslingden with any such limits? It is clear that Haslingden is but a place within another division having limits, in which division petty sessions for that whole division are held at more than one place, Haslingden being one of those places."

BRIDGE.

Presentment for being out of repair—Statute incorporating provisions by reference.—By 13 Geo. 3, c. 78, s. 24, power is given to a single justice to present any highway or bridge out of repair. The 43 Geo. 3, c. 59, enacts that all matters and things in 13 Geo. 3, c. 78, contained relating to highways shall be extended to county bridges as fully as if they were repeated and re-enacted therein. Statute 5 & 6 Will. 4, c. 50, expressly repeals 13 Geo. 3, c. 78, leaving untouched the 43 Geo. 3, c. 59, and by sect. 99 abolished all presentments for non-repair of highways. By the interpretation clause (sect. 5) "highway" is not to include county bridges: Held, that the power conferred by 43 Geo. 3, c. 59, on a single justice of presenting a county bridge is not repealed by the 5 & 6 Will. 4, c. 50. *Reg v. Justices of Breconshire*, 18 Law Journ., N. S., Mag. Cas. 123.

The court was of opinion that the case could not be distinguished from *Reg. v. Inhab. of Merionethshire* (6 Q. B. Rep. 343; S. C. 13 Law Journ., N. S., Mag. Cas. 158).

CORONER.

Charges and expenses of—Discretion of quarter sessions.—A coroner is not entitled to any remuneration for holding an inquest unless, in the judgment of the court of quarter sessions, it was proper that such inquest should have been held; and the Court of Queen's Bench will not review the judgment of the sessions on this point. But disbursements made by the coroner under stat. 7 Will. 4 & 1 Vict. c. 68, after the termination of the inquest, must

be repaid to him, whether it was proper that such inquest should be held or not; and the sessions have no power to disallow them. *Reg v. Justices of Carmarthenshire*, 10 Q. B. 796.

Per Denman, C. J.: "All temptation to hold inquests unnecessarily is removed by making the coroner's *own* remuneration depend upon the decision of the justices, formed upon an examination of all the circumstances. But those who obey his authority, as they must do, in giving their attendance and taking part in any inquest, have their remuneration certain; while, if he errs through inconsideration or officiousness, he is not punished to such an extent as might tend to make him improperly slow in the execution of his office, which might be the case if he held every inquest at the peril, not merely of losing his own time and labour, but being saddled with all the expenses of the inquiry."

COSTS.

Indictment removed by certiorari—Party grieved.—An indictment may be removed by *certiorari* by a defendant upon his giving a recognisance to try in due course, and to pay costs if convicted. And it is provided by 5 Will. and Mary, c. 11, s. 3, "that if the defendant prosecuting such writ of *certiorari* be convicted of the offence for which he was indicted, then the said Court of King's Bench shall give reasonable costs to the prosecutor, *if he be the party grieved or injured*, or be a justice of the peace, mayor, bailiff, constable, headborough, tythingman, churchwarden, or overseer of the poor, or any other civil officer, who shall prosecute upon the account of any fact committed or done that concerned him or them, as officer or officers, to prosecute or present, which costs shall be taxed according to the course of the said court; and that the prosecutor, for the recovery of such costs, shall, within ten days after demand made of the defendant, and refusal of payment, on oath, have an attachment granted against the defendant by the said court for such contempt; and that the said recognisance shall not be discharged till the costs so taxed shall be paid." In a late case an indictment was removed by *certiorari* under the 5 Will. and M. c. 11, but the party bound over to prosecute was not, in fact, a party grieved or injured within the meaning of the statute; however, it was held that the party grieved or injured, if, in fact, the prosecutor, was, nevertheless, entitled to costs, although he was not bound over to prosecute. *Reg v. Bishop*, 18 Law Journ., N. S., M. C. 63; S. C. 13 Jur. 538.

Per Erle, J.: "It appears to me that Provis was the prosecutor within the meaning of the 5 Will. & M. c. 11. Another person having been put forward as prosecutor, it is a matter to be inquired into on affidavit who is really the prosecutor under this act of Parliament. The prosecution was set on foot by Provis; there can be no doubt the proceedings were taken at his instance,

for he instructed the attorney by whom they were conducted. If an action had been brought against Provis for a malicious prosecution, I have no doubt, within the meaning of the statute, he would have been liable. It is said, however, because Stokes was bound over to prefer an indictment, that this is an authority for the defendant's counsel to contend that he was prosecutor. That would be a very strong circumstance to show he was, if unexplained; but, being explained, it does not prevent the parties from shewing who the real prosecutor is. Stokes was authorised by Provis, so that it would apply to Provis as well as to Stokes. Provis, then, being the prosecutor, is the party grieved within the meaning of the statute; and, as he fulfilled the conditions of the recognisance entered into to prosecute, he is entitled to costs.

2. *Of conviction—How recoverable*—11 & 12 Vict. c. 43, s. 18 [stated vol. 1 Mag. N. S., 173; ante, p. 32].—By 29 Car. 2, c. 7, a justice is empowered, in case of a penalty not being paid, to levy it by distress of the offender's goods, or in default of distress to place him in the stocks for two hours unless the penalty is sooner paid. The 11 & 12 Vict. c. 42, s. 18, enacts, that costs specified in convictions shall be recoverable in the same manner and under the same warrants as any penalty adjudged to be paid by such conviction is recoverable: Held, that a conviction under the former act, which adjudged the offender to pay 5s. penalty and 11s. costs, and if not paid to be levied by distress, and in default of sufficient distress adjudged him to be set in the stocks for two hours, unless the said several sums, and all costs and charges of the distress, be sooner paid, could not be supported. *Reg. v. Barton*, 18 Law Journ. M. C., N. S., 56; S. C. 13 Jur. 232.

CRIMINAL INFORMATION.

Time within which it may be moved for against a magistrate.—It has been laid down as a rule by the Court of Queen's Bench that where a criminal information is applied for against a magistrate, the motion must be made within two terms at least, and then early enough to allow of cause being shown before the end of the term. But in one case (*Rex v. Harries*, 13 East, 271; see 1 Gude's Cr. Pract. 111, n. a.) the rule was qualified by the addition, "no assizes having intervened." But it has been held in a late case that a criminal information for misconduct in office may be moved for against a magistrate in the second term after the alleged misconduct, though an assize has intervened, the motion being made early enough to allow of cause being shown in the same term. *Reg. v. Saunders*, 10 Q. B. 484.

HIGHWAY.

Information against parishioners for non-repair of highway—*Bill thrown out by interested grand jury.*—The Court of Queen's Bench

granted an information against the inhabitants of a parish for non-repair of a road, where it was deposed that a bill of indictment had been preferred at the assizes, but thrown out by the grand jury; that two of the grand jurors were proprietors of land in the parish; that one of them, who had acted on behalf of the parish at an earlier stage of the dispute, had stated to the foreman that the road was useless, and that both had taken an active part in opposing the finding of the indictment, such depositions being contradicted only by general statements, that the two had taken no undue or active part in opposing the finding. *Reg. v. the Inhabitants of Upton, St. Leonard's*, 10 Q. B. 827; S. C. 12 Jur. 11; 17 Law Journ., N. S., M. C. 13.

2. *Notice of appeal* [*ante*, p. 17]—*Quarter sessions*—*Mandamus to hear appeal*.—The words in the General Highway Act, 5 & 6 Will. 4, c. 50, s. 85, "quarter sessions" holden for the limit within which the said highway "shall lie," mean the quarter sessions held for the "county, riding, division, shire," &c., in which the highway is situate, and not a mere adjournment thereof held within a particular division. Therefore, where the quarter sessions for the county were held within one division, and afterwards by adjournment within three other divisions, and on an appeal under the 88th section of the General Highway Act, the notice of appeal was given ten clear days only before the adjourned sessions at which the appeal was to be tried, and within which the highway was situate, and not ten clear days before the first holding of the sessions, and the sessions declined to hear the appeal on the ground that the notice had not been given in time, the Court of Q. B. refused to grant a mandamus compelling them to enter continuances and hear the appeal. *Reg. v. Justices of Suffolk*, 5 D. and L. 558.

Per Erle, J.: "The practice of holding the court of quarter sessions by adjournment in different parts of the same county has no doubt arisen since the time of legal memory, and was probably adopted for local convenience, and to save expense to parties having business at sessions. It cannot, however, in any manner alter the legal constitution of those sessions so as to constitute them original sessions for each place, or in fact, in any way to alter their character from that of an adjournment of quarter sessions, begun at one place and thence adjourned to another. No authority was cited, nor am I aware that any exists, to show that sessions 'for the limit' means an adjourned sessions held at a particular place."

LARCENY [*ante*, p. 18—22.]

11 & 12 Vict., c. 46—*Larceny and receiving*—*Several counts—Election*.—Where a prisoner was charged in several counts of an indictment, varying the description of the offence with one act of

insanity, and the indictment also contained other counts of a similar kind, charging the prisoner, under the 11 and 12 Vict. c. 46, with feloniously receiving the property stolen: Held, no objection that there was more than one count for receiving, and that the counsel for the prosecution had properly not been called upon to elect upon which count for receiving he would proceed. *Reg. v. Beeton*, 18 Law J., N. S., Mag. Cas. 117.

LUNATIC PAUPER [*ante*, pp. 4, 5.]

1. *Order of maintenance*—9 & 10 Vict. c. 66, and 8 & 9 Vict. c. 126.—The statute of 9 & 10 Vict. c. 66 (see as to amendment of this act, vol. 1 Mag., N. S., p. 63), prohibiting the removal of a pauper from any parish in which he has resided for five years next before the application for a warrant, does not affect the power of making an order for maintenance, under stat. 8 & 9 Vict. c. 126, upon the parish in which the settlement of the lunatic is adjudicated to be, though he had resided in the parish from which he was removed to the lunatic asylum for five years next before such removal. *Reg. v. Inhabitants of Leaden Roothing*, 13 Jur. 534.

Per Patteson, J.: "It is stated in the case that there was no county asylum, and, therefore, no objection could be made to the actual removal of the pauper in the first instance, to the lunatic asylum; and the right so to remove her is saved by the proviso in sect. 1 of stat. 9 & 10 Vict. c. 66. If, therefore, that had stood alone, it would not have been prohibited by the general words of the enacting clause. But it is said, that the two orders made afterwards amount in effect to such an order of removal, by shifting the burthen of maintaining the lunatic, and that they are, therefore, prohibited by that statute. But I apprehend that is not so; the Lunatic Act, 8 & 9 Vict. c. 126, is not alluded to in the proviso of sect. 1 of stat. 9 & 10 Vict. c. 66, further than that it is provided that the removal of a pauper lunatic to a lunatic asylum, under the powers of any act relating to the maintenance and care of lunatics, shall not be deemed a removal within that act. The enactments of sects. 58 and 62, for adjudicating the settlement and ordering maintenance, are altogether untouched by it. The stat. 8 & 9 Vict. c. 126, therefore stands by itself, and the meaning is, that the parish in which the lunatic pauper is settled, not that in which, but for his lunacy, he would have a right to reside, shall pay for his support, and that an order for maintenance should be made upon it. What the effect of the pauper's residence in the lunatic asylum may be hereafter, if the lunatic recovers, it is not necessary to consider. According to the case of *Reg. v. Salford* (12 Jur. 790), the residence being out of the parish, there would be a break in the five years' residence required by sect. 1 of stat. 9 & 10 Vict. c. 66; but that is inde-

pendent of the order of maintenance, because the residence would be equally broken if that order was not made. Therefore, the orders, adjudging the settlement and directing maintenance, make no difference."

2. *Appeal against order of maintenance—Warrant of removal—* 11 & 12 Vict. c. 31.—By the 8 & 9 Vict. c. 126, s. 62, guardians of an union, &c., affected by any order for the maintenance of pauper lunatics are authorised to appeal against the same in like manner as if the same was a warrant of removal, and the persons appealing or defending such appeal are to have all the same powers, rights, and privileges, and be subject to the same obligations in all respects as in the case of an appeal against a warrant of removal. The 11 & 12 Vict. c. 31, repeals so much of the 4 & 5 Will. 4, c. 76, as provides that in cases of orders of removal copies of the examinations shall be sent, and sect. 9 enacts, "that no appeal shall be allowed against an order of removal if notice of appeal be not given within twenty-one days after notice of chargeability and statement of grounds of removal, or within a further period of fourteen days after sending copies of the depositions: Held, that the provisions in the 11 & 12 Vict. c. 31, extend to appeals against orders for maintenance under the 8 & 9 Vict. c. 126, and that notice of appeal against such orders must be given within twenty-one days after service of notice of chargeability, &c., or within fourteen days from the sending of the copies of the depositions. *Reg. v. Justices of Glamorganshire*, 18 Law Journ., N. S., Mag. Cas. 118.

Per Patteson, J.: "The Legislature, when making the 11 & 12 Vict. c. 31, must be taken to have been aware that appeals against orders for maintenance were required by law to be conducted in the same mannner as appeals against orders of removal."

3. [*ante*, pp. 4, 5]. *Appeal against order—Parish officers and guardians of union.*—Where an order made under the 8 & 9 Vict. c. 126, sect. 62, adjudged the settlement of a pauper lunatic to be in the parish of K. (which is within the C. union), and directed the treasurer of the C. union to pay certain sums for his maintenance, &c.: Held, that both the parish officers of K., and the guardians of the C. union, had a right to join in appealing against the order. *Reg. v. Justices of Lancashire*, 18 Law Journ., N. S., Mag. Cas., 121.

Per Denman, C. J.: "The appeal in this case, included not only an appeal against the payment of the maintenance money, but also one against the adjudication of the settlement. An appeal of this sort must necessarily do so in effect, for the liability to the former must depend on the decision as to the latter. (*Reg. v. Just. Middlesex*, 5 Dowl. and Lownd. 9; *S. C.* 16 Law Journ., N. S., Mag. Cas. 109); and both the parties appellants were necessarily interested in the decision of both parts of the order

* * * As then either party might have appealed separately, and each had an interest in the whole matter of the appeal, we can see no ground for objecting to the joinder of both in one appeal."

PERJURY.

Indictment for perjury—Deputy—Sheriff—On trial before secondary

—Variance—On what averments perjury may be assigned.—In an indictment for perjury on the trial of a cause under a writ of trial directed to the sheriffs of London, the oath is properly alleged to have been taken "before the sheriffs," though, in fact, the case was tried before the secondary. 2. On trial of the indictment for perjury, it appeared that, in the cause tried before the secondary, two issues were joined on the records, but the *postea* showed only a verdict on one: Held, that these facts sufficiently bore out an allegation in the indictment that the "issues came on to be tried, and were tried," and that the perjury was committed "upon the trial of the said issues." 3. It is a good assignment of perjury that a witness swore that he "thought" a certain writing was not his, whereas in truth and in fact he "thought" that it was his. 4. It is no good objection, in arrest of judgment on such indictment, that it charges defendant with having sworn that he had not written certain words in the presence of A., whereas, in fact, he had written them in the presence of A., with an averment of materiality; for A.'s presence cannot be assumed to be necessarily an immaterial fact, though the materiality does not appear otherwise than by such averment. *Reg. v. Schlesinger*, 10 Q. B. 670; S. C. 12 Jur. 283; 17 Law Journ., N. S., Mag. Cas. 29.

Per Denman, J.: "I think we are bound to take notice that the sheriff can appoint a deputy, and that the secondary is so appointed for this purpose in London. If so, he acts in the name of the sheriff; and is correctly described as the sheriff. Possibly it might be good to name either sheriff or deputy. But I think that *Stroud v. Watts* (2 Com. Ben. Rep. 929) and *Reg. v. Dunn* (2 Mood. C. C. 297) sufficiently warrant this allegation, and that to hold the contrary would be shaking the foundations of justice."

QUARTER SESSIONS.

Judges coming into county—During assizes—Borough sessions.—

Where the quarter sessions of a county occur while the judge of assize is proceeding with the trial of prisoners in that county after the grand jury have been discharged, it has been considered proper that the quarter sessions should not proceed with the trial of prisoners; but, after disposing of their other business, should adjourn to a future day (4 Steph. Com. 364, n. o. 2nd edit., referring to 9 Car. and Pay. 790). By some it has been considered that this was absolutely necessary, but it has lately been determined that the authority of the recorder of a borough is not determined or sus-

pended by the coming of the judges into the county, and acting under their commission of oyer and terminer and general gaol delivery; and therefore he may hold quarter sessions of the peace during the time of the assizes in the same county. So, also, may the justices of a county, though generally it would be highly inconvenient and improper to do so. *Smith v. Reg.* (in error) 13 Jar. 850.

Per Denman, C. J.: "It is plain that the principle upon which the coming of the Court of Queen's Bench into any county is held to suspend, not to determine (see stat. 25 Geo. 3, c. 18), other authorities, is this: '*In presentid majoris cessat potestas minoris*'"—as is laid down in Lord Sanchar's case (9 Co. 118 b.). The Court of Queen's Bench is stated, in all our books, to be the highest court of ordinary justice in criminal causes, to which a writ of error lies from other criminal courts; and it is to that supremacy, which no other court has, that the effect of its coming into any county is to be attributed. Whether the justices in eyre had any such superiority as to produce the same effect may be doubted. The same reason does not apply, and the passages in 4 Inst. p. 184, and in Bro. Abr. 'Jurisdiction,' p. 116, are not very satisfactory on the point; and it is in no way material to the present inquiry, unless justices under commissions of assize, oyer, and terminer, and general gaol delivery, have in all respects the same authority as justices in eyre had, which is nowhere distinctly laid down. The justices under such commissions are, indeed, in some sense a court superior to that of the sessions of the peace; they have larger jurisdiction, and the justices of the peace are, by their commission, directed to consult them in weighty matters, and are also required to attend them at the holding of the assizes popularly so called; but the judges of assize, &c., are not a court of error, or superior court, like the Court of Queen's Bench, so as to come, with regard to the court of sessions of the peace, within the principle, '*in presentid majoris cessat potestas minoris*.' The first ground of the argument, on the part of the prisoner, therefore, fails. With respect to the second ground, it is quite true that the granting by the Crown of a subsequent commission determines altogether a prior commission of the same nature. This appears from various authorities, and from the stat. 2 & 3 Ph. and M. c. 18, s. 2, which provides, that commissions of the peace and gaol delivery for any town corporate, not being a county in itself, shall stand, notwithstanding the granting of any subsequent similar commissions to justices of the peace for the shire. But a commission of one nature doth not supersede a commission of another nature; as, a commission of oyer and terminer is not repealed by a subsequent commission of gaol

delivery or of the peace, nor *e converso*, for they are of several natures (2 Hale, *P. C.* p. 26, citing Bro. Abr. *'Commission,'* pt. 24).

SMUGGLING.

Smuggling Act, 8 & 9 Vict. c. 87, s. 2—*Negating exception not contained in the penal clause—Jurisdiction of justices—Defects in warrant—Habeas corpus; practice—Unreasonable detention by justice.*
 —The Smuggling Act 8 & 9 Vict. c. 87, s. 2, enacts that any vessel therein described, which shall be found to have been within certain distances respectively of the coast of the United Kingdom, &c., having on board tobacco not being in a cask, &c. containing 300 lbs. weight, &c., or any tobacco stalks, or other articles specified, shall be forfeited. Sect. 4 enacts that nothing in the act contained shall render any vessel of 120 tons burthen liable to forfeiture on account of any tobacco coming from certain specified places in packages of certain weights respectively, nor to render any vessel of 60 tons burthen liable on account of other articles mentioned in sect. 2, under circumstances which are severally stated in this clause. Sect. 50 enacts that every subject of her Majesty who shall be found to have been on board any vessel liable to forfeiture under this act for being found to have been within certain distances mentioned in this act, having on board or having had on board such goods as subject the vessel to forfeiture, and every person not being a subject, &c. who shall be found to have been on board any vessel liable to forfeiture for any of the causes last mentioned within one league of the coast of the United Kingdom, "shall, upon being duly convicted of any of the said offences before any two justices of the peace, be adjudged by such justices" to be imprisoned, &c. : proviso, that any person proving to the satisfaction of any justice or justices before whom he may be brought that he was only a passenger, and had no interest in the vessel, or any goods on board, shall be discharged: Held, by Coleridge and Erle, Js., Lord Denman, C. J., *dubitante*, that, in a conviction, under sect. 50, for being found in a vessel liable to forfeiture under sect. 2, as having on board prohibited goods, it was unnecessary to negative the exemptions in sect. 4. *Seemle*, per Lord Denman, C. J., that where a statute imposes penalties for an act indifferent in its own nature, and which by the statute itself is not an offence if done under circumstances there specified, the informer must show it to be criminal, and for that purpose negative the circumstances under which, whether they be embodied in the penal clause or not, criminality does not attach. By sect. 103, every warrant of commitment under this or any act relating to the customs shall be deemed valid if set forth an offence in the words of the act; and no such warrant shall be held void for any defect therein if it allege a conviction of such offence, and if it appear to the court before which the warrant is returned that

the conviction proceeded on good and valid grounds. *Semble*, that if, on return of such warrant to a habeas corpus the grounds of conviction are relied upon in answer to an allegation of defect in the warrant, it lies upon the party supporting the conviction to prove those grounds, and that to do this he must bring up the depositions by certiorari. Sect. 58 enacts (for the purpose of giving time to prepare informations, convictions, &c.) that when any person shall have been detained by an officer (empowered by sect. 50) for any offence against this or any other act relating to the customs, and shall have been taken before a justice, if it appear to such justice that there is cause to detain, he is thereby authorised and required to order such person to be detained a reasonable time, and at the expiration of such time to be brought before any two justices, who are thereby authorised and required finally to hear and determine the matter: Held, that although the justice detains the party for an unreasonable time, and he is then brought before two justices and convicted, the conviction is still valid, the jurisdiction to convict depending on sect. 50, and not being affected by the improper proceeding under sect. 58. *Van Boven's Case*, 9 Q. B. 669; S. C. 16 Law Journ.. N. S., N. C. 5; 11 Jur. 119.

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NOTE.—This Abridgment may be referred to in this short way 1 Abr. Crim. L. Cas

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SUPPLEMENT
TO
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MICHAELMAS TERM EXAMINATION ANSWERS.

[Continued from vol. 6, p. 499.]

CONVEYANCING.

I. *Lease*.—A lease is the grant of the possession of lands or other things to a person for life, years, or at will (Watk. Convey. B. 2, chap.4). The ordinary outline or form of a lease of a house is as follows:—1st. Date and parties. 2nd. Demise of the premises (adding general words). 3rd. Habendum of the term (say twenty-one years) determinable as afterwards mentioned. 4th. Reddendum of the rent, half-yearly or quarterly (except while premises uninhabitable by reason of fire, &c., 3 Law Stud. Mag., 92, 93), clear of all rates and taxes. 5th. Covenants by lessee, as, to pay the rent, and rates, and taxes (except land tax); and to paint and repair (except in the case of fire): power to lessor to enter during the term to view state of repairs, and further covenant to repair within (six) months after written notice of dilapidations, and not to suffer offensive trades to be carried on; and to quit and yield up at end of term. 6th. Proviso for re-entry by lessor in case of rent remaining twenty-one days in arrear, or of breach of covenant. 7th. Covenants by lessor, as for quiet enjoyment, and (sometimes) for renewal. 8th. Power to lessee to determine the lease at the end of seven or fourteen years respectively. 9th. Conclusion. An inventory or schedule of fixtures is sometimes annexed. A covenant to insure (by lessor, or by lessee,

as agreed upon) is frequently inserted. If the lessor were himself only a leaseholder, he should covenant to keep his lessee indemnified against the rent and covenants reserved, &c., in the original lease. The lessee frequently covenants not to assign or underlet without license.

II. *Surrenders—Under leases.*—In order to the effectual surrender of an original lease, it is necessary that any under lease, theretofore granted, be also rendered up, for unless this be done, the under lease will continue to exist, inasmuch as where an estate ceases, except by condition expressed on its creation, such cesser does not hurt any interest or charge derived thereunder. In fact, as to such surrender, the maxim, *Cessante statu primitivo cessat derivatum*, has no application (Shepp. Touch. 301, by Preston; 1 Prest. Abstr. Title, 197, 317, 358, 359; Rudall's note to Co. Litt. 435; Broom's Max. 372, 2nd edit.). However, to provide against the consequences of surrender, in certain cases, it is enacted by 4 Geo. 2, c. 28, s. 6, that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any of the under leases, be as good and valid to all intents and purposes as if all the under leases derived thereout, had been likewise surrendered, at or before the taking of such new lease. And that all and every person and persons, in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her, and their executors and administrators, shall be entitled to the rents, covenants, and duties, and have like remedy for recovery thereof, and the under lessees shall hold and enjoy the messuages, lands, and tenements in their respective under leases comprised, as if the original leases out of which the respective underleases are derived, had been kept on foot and continued, and the chief landlord and landlords shall have and be entitled to such and the same remedy, by distress and entry, in and upon the messuages, lands, tenements, and hereditaments, comprised in any such under lease, for the rents and duties reserved by such new lease, so far as the same exceed not the rents reserved in the lease out of which such under lease was derived, as they would have had in case such former lease had still been continued, or as they would have had in case the respective underleases had been renewed under such new principal lease; any law, custom, or usage to the contrary thereof notwithstanding. The above statute does not operate to confirm leases. Its effect is merely to authorise surrenders, with a reservation of the privity and relation of landlord and tenant, between the original lessee and his under lessees, when the original lessee takes a new lease; and to give to the original lessees the same remedies against their tenants, as they might have pursued prior to the surrender. The scope of the statute is to place the

original lessees, and the ground landlord, exactly in the same situation as if no surrender had been made, and now the ground landlord may distrain on the land for the reserved rent; and the original lessee may recover the rents reserved to himself, and enforce the covenants entered into by the under lessee. But the statute has no words by which under leases derive any additional effect from a renewal. If void before the surrender, they continue void afterwards, and are not established by the renewal. These leases continue to be precisely in the same state as if no new lease were obtained (3 Pres. Conv. 140).

III. *Joint tenancy and coparcenary*.—The primary difference, as to effect between an estate in joint tenancy and one in coparcenary is, that in joint tenancy on the death of one of the tenants, a right to his share accrues to the other by survivorship, whilst in coparcenary, on the death of one of the parceners, her share goes to her heir, and not to the surviving coparcener. This is expressly stated in Littleton's Tenures, sect. 280, which should be read. See also ss. 281 and 282, and the notes thereto as to survivorship of chattels and joint debts. Parceners always take by descent, joint-tenants by purchase, as stated by Littleton, s. 254, and see note also, s. 662.

IV. *Remainders and reversions*.—An estate in remainder is the residue of an estate at the same time appointed over, grounded upon some particular estate given before, and beginning in possession when the particular estate ends (Co. Litt. 143, 203, b. n. (1); Noy's Max. chap. 12). An estate in reversion is the residue of an estate, which is left, after some particular estate granted out, in the grantor (Noy's Max. ch. 13; see more fully, 4 Law Stud. Mag. 152; 6 *Id.* 242, 243).

V. *Advowsons*.—An advowson is the right of presentation to a church, or ecclesiastical benefice, and is synonymous with patronage, whence the party who has the right of advowson is called the patron of the church (3 Steph. Com. 65, 2nd edit.). Advowsons are either appendant or in gross. They are also either presentative, collative, or donative (First Book, 155, where, 4th line from top, for "and does not pass" read "and passes"). If the right of presentation be in several coparceners, and they cannot agree whom to present, they shall present in turn according to seniority (Barker v. B. of London, Willes, 659; 1 Hen. Black. Rep. 412).

VI. *Mortgage*.—It is not easy to give a correct definition of a mortgage, at least none that will concisely state what is meant thereby. Some call the estate the mortgage, others the money. We have before given a definition (v. 6, 244), and we now add by way of historical explanation, that by the common law, as appears from Littleton (sect. 332) when a feoffment was made by way of mortgage, the feoffor was considered as a grantor, and the feoffee as a grantee of an estate upon condition. If the money was not repaid

before, or on an appointed day, the estate became the indefeasable property of the mortgagee; the mortgagor's right of re-entry was lost, and the estate could not be re-vested in him without a formal re-conveyance. The land was regarded as the *principal*, the now so called *mortgage* (i. e. the debt), an *accessory*. In the civil code, the doctrine was reversed; the mortgage was the *principal*, the estate but an accessory. Of these modes of viewing the subject, the latter is obviously the more correct: the money is the motive of the conveyance; re-payment of the money is, therefore, a satisfaction of that motive. And the definition we before gave (v. 6, 244) is consonant with this doctrine, viewed through the medium of equity, which treats the equity of redemption as an *estate* in the land, the person entitled to it, as the real *owner* of the land, and the mortgage (i. e. the debt) as personal assets (Jickling's Analogy, 60—62).

VII. *Form of mortgage*.—The following is a general outline or form of mortgage of leasehold houses. 1. The parties. 2. Recital of lease. 3. Recital of agreement for mortgage. 4. Covenant for payment of mortgage money with interest on a certain day, usually six calendar months from the date of the mortgage. 5. Demise of premises for residue of original term, except the last [three] days thereof. 6. Proviso for redemption on payment of principal and interest on day named. 7. Covenant for payment of interest on principal if default made on day named. 8. Covenant by mortgagor, that the rent of original lease has been paid and the covenants observed. 9. That mortgagor has right to demise. 10. For further assurance. 11. That during the continuance of the security, the rents and covenants shall be paid and performed, and the mortgagee be indemnified. 12. Proviso for quiet enjoyment by mortgagor until default. 13. Covenant to keep the premises insured, and that in default mortgagee may insure, and expense to be a charge. 14. Power of sale. 15. Mortgagee's receipts to be discharges to purchasers. 16. Indemnity clause.

VIII. *Equity of redemption—Statute of limitations*.—By sect. 28 of 3 & 4 Will. 4, c. 27, when a mortgagee shall have obtained the possession or receipt of the profit of any land, or the receipt of any rent comprised in his mortgage, the mortgagor or any person claiming through him shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless, in the mean time, an acknowledgement of the title of the mortgagor, or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor, or person, in writing signed by the mortgagee, or the person claiming through him; and in such case, no such suit shall be brought, but within twenty years next after the time at which

such acknowledgment, or the last of such acknowledgments, if more than one, was given (see further, Prin. of Equity, 296—299).

IX. *Equitable mortgage*.—Equitable mortgages are such as are created by a deposit of the title-deeds with a creditor as security for an antecedent debt, or on a fresh loan of money (2 Story's Eq. Jurisprud. 1020; Princ. Equity, 303—305). The mere fact of a deposit of title-deeds with a creditor as a security, is sufficient to create an equitable mortgage (see further, Princ. Eq. 303—305).

X. *Estates tail—Words of creation*.—Estates in tail are divided into those which are special and those which are general. An estate tail general is, where lands and tenements are given to "a man and the heirs of his body begotten," which is called tail general, because how often soever such donee in tail be married, his issue in general, by all and every such marriage, is, in successive order, capable of inheriting the estate tail, pursuant to the form of the gift. An estate tail special is, where the gift is restrained to the heirs of the donees body by a particular person, as where lands and tenements are given to "a man and the heirs of his body on Mary, his now wife, to be begotten," here no issue can inherit but such special issue as is engendered between them two, not such as the husband may have had by another wife, and, therefore, it is called special tail. Estates in general, and special tail, are further diversified by the distinction of sexes in such entails, for both of them may either be in tail male, or tail female, as if land be given to a "man and his heirs male of his body begotten," this is an estate in tail male general, but if to "a man and the heirs female of his body on his present wife begotten," this is an estate in tail female special. And in case of an intail male, the heirs female shall never inherit, nor any deriving from them. Nor the converso, the heirs male in case of a gift in tail female (2 Black. Com. 113; 1 Steph. Com. 230; Burt. Comp., 244; Noy's Max. chap. 4, and see notes to sects. 23 and 24 of Littleton's Tenures).

XI. *Curtesy*.—Tenant by the curtesy of England is (in Littleton's words, s. 35) where a man taketh a wife seised in fee simple, or in fee tail general, or seised as heir in tail special, and hath issue by the same wife, male or female, born alive (capable of inheriting as heir to the wife, Litt. s. 52), albeit the issue after dieth or liveth, yet if the wife die, the husband shall hold the land during his life by the law of England. Four circumstances are requisite for enabling the husband to be tenant by the curtesy. 1st. A legal marriage; but if the marriage be voidable only, the husband will be tenant by curtesy, unless the marriage be actually avoided during the lives of both parties (1 Roper's Hus. and Wife, 5; Hicks v. Harris, Carthew. 271; 2 Vesey, sen. 245; 7 Coke's Rep. 43. b.; 2 Barton's Elem. Conv. 192; 2 Black. Com. 127). 2nd. The wife must have a seisin in deed of corporeal hereditaments either before or after issue born (Co.

Litt. 29 a. 30 a.; 3 Atkins, 469, 10 Moore, 236); but of incorporeal hereditaments, a seisin in law (being that only which can be had) will suffice, and the same is the case with remainders and reversions (Co. Litt. 29 a. and notes; Paine's case, 8 Coke's Rep. 34). 3rd. The wife must have issue born alive, in her lifetime, and capable of inheriting the estate (Co. Litt. 29, b; Paine's Case, 8 Coke's Rep. 34; 2 Black. Com. 127, 128; Dyer, 25 b.). 4th. The last requisite to consummate the husband's right to curtesy, is the death of the wife (Co. Litt. 30, a (h); 2 Black. Com. 128). See as to these requisites, 1 Steph. Com. 247, 248; 2 Barton's Elem. Convey. 192—206). A husband is not entitled to curtesy of a copyhold, unless there be a special custom to warrant it (Gilb. Tenures, 160; Scriven on Copyh. 60, 94, 2nd edit.; Co. Litt., 33, a (z); 33, b. (i); 4 Coke's Rep. 22, b. 30.; Shelf. Real Prop. Stats. 335, 3rd edit.) In gavelkind lands, which occur chiefly in Kent (Litt. s. 210) the husband has only a moiety for his curtesy, and that too only whilst he lives unmarried, but then his title attaches, whether there be issue born or not (Robinson's Gavelkind, b. 2 ch. 1.; 4 Bacon's Abrid. 55, 56, 7th edit.).

XII. *Emblements*.—Emblements is a term applied to certain kinds of crops growing on the lands at the time of the determination of a tenancy of uncertain duration, and to which the tenant is entitled if the determination of his tenancy was not by his own act. The doctrine of emblements extends, not only to corn sown, but to roots planted, as hops (Hargrave, Co. Litt. 55, b. note 1) or other artificial annual profit. It does not, however, extend to fruit trees, grass and the like, which are not planted annually at the expense and labour of the tenant, but are either the permanent or natural profit of the earth (Comyns' Dig. tit. Biens (G. 1); Co. Litt. 55, 56; 2 Black. Com. 122; 1 Steph. Com. 242, 269; 2 *id.* 247; Watk. Conv. p. 3. by White; 28 L. Mag. 341). Emblements can be claimed only in a species of crop which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed; and it seems that where (as in the case of clover) the vegetable is capable of yielding several crops, the tenant *pur autre vie*, having cut one crop, as emblements during the year, is not entitled to emblements of crops cut by the reversioner, more than one year having elapsed from the sowing (Graves v. Weld, 5 B. and Adol. 105; 2 Nev. and Man, 725, S. C.). On the determination of the estate of tenant for life, except by his own act, his representatives are entitled to the emblements, and his lessee for years is entitled, even where the estate is determined by the tenant for life's own act. So a tenant for years is entitled to the emblements wherever his estate depends on an uncertainty (Co. Litt. 56 a). So a tenant at will, where the will is determined by the lessor (see Littleton's Ten. pp. 41, 43).

XIII. *Execution of wills*.—The requisites to the due execution of a will (except as to the will of soldiers and mariners on service respecting personality) are prescribed by sec. 9 of 7 Will. 4, and 1 Vict. c. 26, namely, that the will must be in writing, and must be signed at the foot or end thereof by the testator, or by some other person, in his presence and by his direction, and such signature must be made, or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses must attest and subscribe the will in the presence of the testator, but no form of attestation is necessary (1 Steph. Com. 533, 544: 6 Law Stud. Mag. 479, 482).

XIV. *Will—Revocation by marriage*.—By s. 18 of 7 Will. 4, and 1 Vict. c. 26, a will made by a man or woman is revoked by his or her marriage (except a will made in exercise of a power of appointment, where the real or personal estate thereby appointed would not in default of such appointment pass to his or her heirs, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions). In fact, marriage is now the only remaining *constructive* revocation of a will. Formerly, in the case of men there must also have been the birth of issue (see 2 Eden, 263; Walker v. Walker, 2 Curt. 854). A will made before the day on which the act came into operation is not revoked by the testator's marriage *subsequent* to that day (*re* Sherley, 2 Curtis, 657).

XV. *Dower—How barred*.—Dower is that estate which a woman becomes entitled to on the death of her husband in his lands held in fee simple, or in fee tail. She is generally entitled to one-third, but in gavelkind lands she has a moiety (Co. Litt. 30, b; Litt. ss. 37, 166). The old form of barring dower in a purchase deed was as follows:—"To have and to hold the said hereditaments hereinbefore described, with their appurtenances unto the said (purchaser) and his heirs, to the uses, and upon the trusts hereinafter declared, that is to say, to such uses, generally, by way of rent charge thereout, or otherwise, and either absolutely, or conditionally, as the said (purchaser) by any deed or deeds, to be sealed and delivered by him in the presence of, and attested by, one or more credible witness or witnesses, shall appoint, and in the mean time, and subject to such uses as shall have been limited by the said (purchaser) as aforesaid, to the use of the said purchaser and his assigns during his life; and after the determination of that estate by any means in his lifetime, to the use of the said (trustee) his executors, and administrators during the life of the said (purchaser), upon trust for him the said (purchaser) and to the express intent, that the present, or any future wife of the said (purchaser) may not be entitled to dower, and after the determination of the said estate limited to the said trustee, in trust for the said (purchaser), to the use of the said (purchaser)

his heirs and assigns for ever" (see Fearn, 347, n. 8th edit). If the parties were married since the 1st of January 1834, the widow will be effectually barred of her dower, if in the deed by which the estate is conveyed to the purchaser, or in any deed executed by him (or by his will) it shall be declared that his widow shall not be entitled to dower out of such land. So the husband's alienation of the land will be an effectual bar to dower thereout.

EQUITY. (vol. vi, p. 491).

I. *Equity defined.*—It is extremely difficult to give any exact definition of equity, particularly as the term "equity" is itself used in various senses by different writers. The only definition which appears to us to be at all intelligible with reference to the term "equity" as used in our courts of equity, is the following, though it is open to the objection of being a mere truism. Equity is that portion of remedial justice which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of law (1 Story's Eq. Jurisprud. s. 25). Or equity may be said to be a portion of justice or natural equity, not embodied in legislative enactments, or in the rules of common law, yet modified with a due regard thereto, and administered where the courts of law cannot, or originally did not clearly afford any relief, or adequate relief, at least not without circuity of action or multiplicity of suits, or cannot direct such restrictions adjustments, compensations, qualifications, or conditions, as may be necessary in order to take a due care of the rights of all who are interested in the property in litigation (see Prin. Equity, 6—12.) So that in fact, equity is a supplementary system, stepping in to supply the deficiencies of the law.

II. *Difference between equity and law.*—The essential difference between equity and law is really to be found in the three following particulars. 1. As to the subjects over which they exercise jurisdiction. 2. In the kind of relief they administer. 3. In the method of proceeding (First Book, 321, 322).

III. *Relief in equity, in what cases.*—Equity gives ordinary relief in cases of accident, mistake, fraud, trusts, specific performance of agreements, administration, accounts, partition, injunctions, bills of peace, infants, married women, lunatics, discovery, preserving testimony, &c.

IV. *Objects attainable by means of equity.*—Some of the most important objects attainable through the medium of courts of equity, are the preservation of property pending litigation, the specific performance of agreements, the delivery up of deeds, &c., fraudently obtained, the distribution of a deceased debtor's estate, the effectual carrying out of a trust, the satisfactory adjustment of complicated

accounts, redemption of a mortgage, the protection and care of lunatics, &c.

V.—It is the constant aim of a court of equity to do complete justice by deciding upon, and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and prevent future litigation (Lord Red. 133). For this purpose, all persons materially interested in the subject, ought, generally, either as plaintiffs or defendants, to be made parties to the suit, or ought by service upon them of a copy of the bill, to have an opportunity afforded of making themselves active parties in the cause, if they should think fit (Pract. Equity, 25, *et seq.*, where the subject of parties to suits is fully treated of).

VI. *Parties to suits*.—The strict rule as to all persons materially interested being made parties to a suit is relaxed in several cases. Thus, a single creditor may sue on behalf of himself and other creditors of a deceased party for the administration of his estate. So in an administration suit, the general creditors and legatees are not necessary parties, but are sufficiently represented by the executors or administrators. So where a number of persons have a common interest, and it is impossible to make them all parties to the suit, a few individuals may sue on behalf of all the members of the company except such as are made defendants (see 16 Ves. 326; *Walworth v. Holt*, 5 Jur. 237; *Barker v. Walters*, 8 Beav. 92; S.C. 9 Jur. 73). In addition to these exceptions from the strict rule, we have the exceptions introduced by the order of the 26th Aug., 1841. These will be fully noticed in the "Practice of Equity."

VII. *Bankrupt, party to suit*.—As the interests of a bankrupt (whether the interest be legal or equitable) must have devolved upon his assignees, he cannot be made a party to a suit as defendant, relative to any property which is affected by his bankruptcy (*Whitworth v. Davies*, 1 Ves. and B. 547; *Golla v. Ward*, 3 P. Will. 311, note; *Collett v. Woollaston*, 3 Bro. C. C. 228). If, however, fraud and collusion between the assignees and the bankrupt be charged, the bankrupt may be made a defendant (*King v. Martin*, 2 Ves. jun., 641, cited *Redeas*, Plead. 162).

VIII. *Retainer*.—A retainer should be taken by a solicitor before filing a bill or defending a suit, and it should properly be a written one (see Pract. Equity, 18—21).

IX. *Instituting suit*.—A suit must be instituted by bill or information (First Book, 324).

X.—The first proceeding in a Chancery suit is, the bill of complaint, which is in the nature of a petition to the Lord Chancellor, stating the subject matter of complaint, and praying a relief. The party preferring the bill is called the complainant, or plaintiff, and

the party against whom the suit is instituted is called the defendant.

XI.—A bill in equity is commonly described as consisting of nine parts. The first part contains the address of the bill to the Lord Chancellor. The second part contains the names, description, and places of abode of the plaintiffs. The third part is termed the stating part of the bill, which consists of the plaintiff's case, or in other words, the facts upon which he rests his title to relief. The fourth part consists of a general charge of confederacy against the defendant, which is now, however, frequently omitted. The fifth part consists of allegations of the defendant's pretences and what are called charges in corroboration of them. The sixth part consists of an averment that the acts of the defendant complained of are contrary to equity, and that his only complete remedy is through the medium of a court of equity. The seventh part consists of interrogations, and a prayer that the defendants may answer the matters alleged against them in the bill. The eighth part contains the prayer for relief. The ninth part consists of a prayer of process, that is, that a writ of subpoena may issue against the defendant to compel him to answer upon oath to all matters charged against him in the bill (First Book, pp. 324, 325).

XII. *Filing bill*.—A bill must be filed either by the party in person, or by a duly certificated solicitor (see, for the consequences of solicitor being uncertificated, Pract. Equity, p. 22).

XIII. *Fraud—Relief*.—In the case of a contract obtained by fraud, courts of equity will interfere to prevent proceedings at law, and will also, in clear cases, order the contract to be delivered up to be cancelled, or will direct an issue to ascertain whether same was obtained by fraud. Mr. Justice Story (2 Eq. Jurisprud. s. 695) says, "Without attempting to go over the different classes of fraud, it may be stated, that courts of equity will generally set aside, cancel, and direct to be delivered up, agreements, and other instruments, however solemn in their form or operations, where they are voidable and not merely void, under the following circumstances. First. Where there is actual fraud in the party defendant, in which the party plaintiff has not participated. Secondly. Where there is a constructive fraud against public policy, and the party plaintiff has not participated. Thirdly. Where there is a fraud against policy, and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand. And lastly, where there is a constructive fraud by both parties, but they are not in *pari delicto*."

XIV. *Administration—Priority of debts*.—An executor is not justified in paying a simple contract debt before a specialty debt of which he has notice; but he may prefer any simple contract creditor to any other such creditor, or a specialty creditor to other specialty creditors (see Princ. Equity, 128, 129).

XV. *Administration suit*.—As a decree in equity is held of equal dignity and importance with a judgment at law, a decree on a creditor's bill for administration of assets being for the benefit of all the creditors, makes them all creditors by decree, on an equality with creditors by judgment, so as to exclude, from the time of such decree, all preference in favour of the latter (*Perry v. Phillips*, 10 Vesy, 38; *Gilpin v. Southampton*, 18 Ves. 469). As soon as the decree to account is made in such a suit, brought in behalf of all the creditors, the executor or administrator is entitled to an injunction out of Chancery to prevent legal proceedings against him by any of the creditors, except under the direction of the Court of Equity by which the decree is made (2 *Daniel's Pract.* 1488, 2nd edit.; *Martin v. Martin*, 1 Vesey, 211; *Paxton v. Douglas*, 8 Vesey, 520). However, in a late case, a motion to restrain a creditor, after decree, from proceeding at law, was refused; the decree being for an account of assets and debts only in the event of the plaintiff's security proving deficient. A creditor will not be restrained after decree, from proceeding at law, unless he can come in under the decree (*Ranken v. Harwood*, 15 *Law Journ.*, N. S., *Chanc.* 446; *S. C.* 10 *Jur.* 794; see further *Princ. Equity*, 127).

ON THE LAW OF COVENANTS.

[The present subject of the law lectures is the law of covenants, and as this is a practical subject, and one likely to be useful to our readers, we intend to give a pretty full statement of the law, though we shall by no means confine ourselves to the order, or even matter of the lectures. The fact is, that the lectures, as delivered, are *quite useless*, except for students who have the reports to refer to. The lecturer's object is to direct attention to cases which are *afterwards* to be carefully read. We shall give, occasionally, abstracts of some of the cases, so as to make the subject more intelligible to those who have not the reports to refer to. We propose to continue the subject of covenants, if possible, in each subsequent number.]

The first thing we have to consider in treating of covenants, is their nature and constitution:—

Nature and constitution of covenants.—A covenant may be defined to be an engagement under seal, whether by way of declaration or promise, from one person or body to another person or body. 1. It is an engagement, and the person who makes it, binds himself. 2. The instrument must not only be in writing, but it must, in addition, be under seal. 3. A covenant is not merely a promise to do

or not to do some future thing, but it may be a declaration of some past act (Plowd. Com. 308), and even of a present ability : as that the grantor has lawful power to convey (3 Woodd. 86 ; but Com. Dig. tit. Covenant, A. 1, is contrary, and see 2 Bac. Abr. tit. Covenant, p. 337, 7th edit.). 4. It is essential that the contract or agreement, declaration or promise, be made to some other person. 5. The parties must be either natural or civil, *i. e.*, either an individual or body corporate.

There are several distinctions recognised by our law writers as to covenants, but which need not here be noticed at length : they are such as arise necessarily from differences in the terms used to express the things covenanted to be done, &c. Thus, if a covenant be to do something in particular, it is called affirmative ; whilst, if the covenant be to abstain from doing something, it is said to be negative. If it relate to a thing past, it is called a covenant executed, whilst if it is a promise to perform some act *in futuro*, it is called an executory covenant. It must be remarked, that the distinction as to affirmative and negative covenants is, in many cases, very important in courts of equity, as will be hereafter noticed.

Some distinctions which are essential will now be noticed. 1. A covenant, though ordinarily treated as a contract obligatory, may be likewise an assurance. Thus, a covenant in consideration of blood, that the other party shall have his lands, makes the covenantor to stand seised at once, though it is a mere covenant to do so. In fact the covenantor is then a person seised to the use of another, and the statute of uses executes this use in the covenantee, who thus gets a legal estate and nothing is left in the covenantor (see Plowd. Com. 301, 303 ; Com. Dig. tit. "Covenant," G. 1). Such a conveyance is one that does not operate by transmutation of possession. In a covenant to stand seised (which, however, is now disused), there must be a relationship of blood : but though this does not exist, the covenant would still have effect as an *obligation*. This illustrates the difference between a covenant and an assurance. Another instance is this : if a party covenant that another shall have a piece of land for a certain term, the covenantee takes as if the lease were actually made. All other covenants may be considered as *obligations* merely.

Distinctions arise out of cases where several persons covenant with each other in respect of matters which are parts of one transaction. The covenant may be either a single one, or there may be several stipulations. When single and conditional, one thing is considered as the cause of the other thing, and unless performed, performance of the covenanted act cannot be compelled. Thus, if A. covenant that if B. will pay a certain sum within a year he shall have his land at a X. and B. do not pay within the year, he cannot, at law, have the land, or damages for non-conveyance. But in equity,

if the party should pay the sum in question after the year, he could obtain specific performance, as time is not, in such case, of the essence of the contract. The court looks at the substance, and that is satisfied by payment after the year.

Where there are mutual stipulations, each party covenants for his own acts. In such case, each party has generally a right of action against the other for the breach of his covenants, without averring a performance of the covenants on his, the plaintiff's part; and the defendant cannot plead non-performance of such contracts on the part of the plaintiff in bar of the plaintiff's action (*Dawson v. Myer, Strange, 712*).

It has been said, that a covenant is an engagement under seal. This is the distinguishing characteristic of covenants. A promise in writing from A. to B. to pay him £20, is not a covenant. A deed then is necessary to make a covenant. The requisites of a deed are, 1. A writing; 2. That it be on paper or parchment; 3. Though it is not essential that every deed should be signed, for at common law this was not requisite, yet by the statute of frauds, a signature is required in certain cases (see *Bacon's Abr. tit. "Obligation"*). 4. The deed must be sealed on delivery. As to delivery, unless the contrary be shown, the presumption is, that it has taken place. No particular words are required to constitute a valid delivery, and a delivery without any words will be sufficient. So a delivery by words without any act will be good (see *Doe d. Garnons v. Knight, 5 Barn. and Cres., 677*). An *escrow* is a deed delivered conditionally to a third person to be delivered for the benefit of the party named grantees, &c., when some act on his part shall be performed (1 *Stu. Com., 470, 2d edit.*). If the condition be never performed, it never becomes a deed. Upon the subject of the delivery of a deed, the case of *Doe dem. Garnons v. Knight*, just referred to, is important. That case in effect decided that where a party to any instrument seals it, and declares in the presence of a witness that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid and effectual deed: and delivery to the party who is to take by the deed, or to any person to his use, is not essential. Delivery to a third person for the use of the party in whose favour the deed is executed, where a grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made.

Indentures and deeds poll. — Deeds are divided into such as are poll and such as are indentures. A deed poll is executed by one

person only, whilst indentures are executed by, or at least made between several parties.

Consideration in deed. — There are some peculiarities of contracts under seal which require notice. They apply generally to all deeds. One peculiarity is, that a contract under seal requires no consideration to support it, for the law presumes it. In the case of a promise by one person to another, it is either sealed, or it is not; if not it is void, if there be no sufficient consideration; if it is sealed it is valid, whether there be a consideration in fact or not. This is a distinction of great practical importance in questions relating to assets. It not unfrequently happens that creditors by specialty (who have a priority in the administration of assets) exhaust the whole fund and leave the simple contract creditor nothing.

Illegality. — If the consideration of a deed be such that it is said to be tainted with illegality, it will be liable to be avoided. It makes no difference whether this illegality arise from some rule of law, or from a statutory enactment, or in any other way. A deed whose consideration is founded on a compromise of a public prosecution, or on a future separation between husband and wife, or in restraint of trade, or for future cohabitation, &c., is void (see *Princ. Com. Law*, 49—58; *Princ. Eq.* 56—63; see also *Coppock v. Bower*, 4 Meca. and W. 361; *Jones v. Waite*, 5 Bing. N. S., 341; 9 Scott N. R. 951; *Hindley v. Westmeath*, 6 Barn. and Cres. 200).

If there be several considerations and part be bad, the whole is bad, where it is impossible to distinguish the legal consideration from that which is illegal (see 2 Bacon's Abr. tit. "Covenant," G., p. 365, 7th edit.). "When that which is good and that which is void are put together in the same grant, the common law makes such a construction that the grant shall be good, for that which is good, and void for that which is void" (per Hutton J. *Ley's Rep.* 79, cited 8 East, 236). In fact, the distinction seems to be this: if any part of the consideration for the contract be illegal, it vitiates the whole (per Tindal C. J., in *White v. Jones*, 1 Scott, 735; S. C. 1 Bing. N. S., 662); but if it be void merely and not either *malum prohibitum* or *malum in se*, the contract may be supported by the residue of the consideration, and if it be good *per se*, and divisible (*Addison's Contr.* 25; *King v. Sears*, 2 Cr. M. and R. 48; S. C. 5 Bing., N. S., 341; *Sheerman v. Thompson*, 11 Adol. and El. 1037; S. C., 4 Jur. 820). The most recent case as to one part of the consideration which is illegal having the effect of vitiating the whole, is the case of *Hopkins v. Prescott* (16 Law Journ., N. S. C. P., 258; S. C. 11 Jurist, 562) deserves attention, especially the arguments, though it is not indeed the case of a covenant, but of a mere agreement. The agreement between the plaintiff and defendant recited, that the plaintiff had for a long time carried on business as a law stationer, and also

had been a sub-distributor of stamps and collector of assessed taxes, and it then stated, "that in consideration of £300, payable by instalments, the plaintiff agreed to sell, and the defendant agreed to purchase, the business of a law stationer, theretofore carried on by the plaintiff; and it was thereby further agreed between them, that the plaintiff should not, after the 1st of March, then next, carry on the business of a law stationer, or collect any assessed taxes, &c., but that he the plaintiff, would use his utmost endeavours to introduce the defendant to the said business and offices, &c.," the court held, that this agreement was for the sale of an office within the 5 & 6 Edw. 6, c. 16, that it formed one entire contract, though embracing several distinct acts, and that the declaration was consequently bad.

Estoppel.—Another peculiarity is, that an indenture may operate to produce an estoppel: that is, the party who executes the deed is not permitted to deny what is there stated. There is no estoppel where the writing is not under seal. Thus a creditor who has acknowledged in an unsealed writing the receipt of a sum of money, is not thereby estopped. Estoppel is of two kinds. It either prevents a man from disputing a fact or it produces a conveyance of land, &c. Thus, if a party, not being seised of certain land, alleges that he is seised, and affects to convey it, if he afterwards acquires it, he is estopped to say that nothing passed by his conveyance.

Merger.—Another peculiarity is, that of merger. If there be an engagement by way of simple contract, and afterwards another be made in respect of the same matter under seal, this latter transaction will effect a merger of the former one, which may be said to be swallowed up in the deed.

Dissolving covenants.—Another peculiarity is this, that an obligation cannot be got rid of by anything of an inferior degree. It can be got rid of only by the same kind of instrument as itself (6 Co. Rep. 53; 2 Man. & Gr. 751. Noy's Max. m. 10; Brown's Max. 681 — 691, 2d edit.). The rule by which a covenant cannot be discharged by writing only, is a rule of law only, for equity would interfere where a party had agreed to execute what was required, and would by an injunction prevent him from availing himself of the want of a deed.

Covenants real. — Another distinction must be attended to. A covenant may relate to land, or it may not. When it relates to land it is termed a covenant real, as to which many important points will hereafter be noticed. At present, mention only will be made of one or two points. Covenants real were called also warranties. A covenant real was a covenant annexed to land, by force whereof a man and his heirs were bound to defend the title. It barred the party making it from any right in the land; his rights became ex-

tinct, as were those of his heirs also, though no assets descended to them, except, indeed, heirs in tail, but they were bound if assets descended. So heirs general, as well as those in tail, were bound by collateral warranty, even though no assets descended, except in certain cases provided for by statute (see note to sect. 697 of Littleton, also, ss. 724, 727). There has been a great difference of opinion as to the phrase "covenant real." If a man covenant for himself and his heirs, this is by some called a covenant real. This makes the definition to depend not on the subject matter, but on the fact of the covenantor's heirs being liable. According to this, any covenant, though relating to a matter purely personal, would be a covenant real, provided only the covenantor's heirs were bound. But this is not the sense in which the expression is ordinarily used. For it is confined to those covenants which have for their object something inherent in, and connected with land, whether binding the heir of covenantor in express terms or not.

Implied covenants.—There are also covenants which arise by intendment of law. Thus, an instrument may contain no clause which on the face of it express a covenant, which yet may have an operation the same as a covenant, and bind the parties to the same extent. Thus, in a demise for years, if there be no express covenant for quiet enjoyment, yet it is presumed, and if there be an action, an action will lie. It arises from privity of *estate* and continues so long as that continues, but it does not entail on any one a liability, except only whilst the estate is held by him (see Watkins's Convey. by White, 302, 303; Adams v. Gibney, 6 Bing. 656). Implied covenants however, are confined to real property, and do not, therefore, extend to goods (Com. dig. tit. "Covenant," A. 4).

As to covenants express, there is, during the whole period for which they operate, a right and liability on them, and they cannot be got rid of by merely disposing of the property.

Words creating a covenant.—No technical or particular set of words are required in order to create a covenant. We may properly say, that every instrument under seal is a covenant. If two persons in a sealed instrument come to an agreement, and the word "agreement" is used, or its equivalent, it is not merely a contract, but it is the several covenant of each (see Saltoun v. Houston, 8 Moore, 546; S. C. 1 Bing. 440; Sampson v. Easterby, 9 Barn. and Cres. 505; in error, 6 Bing. 644; Berry v. Claudet, 1 Law Times, p. 201). These cases should be consulted, and the arguments and judgments be carefully perused. In Saltoun v. Houston, by indenture between S. F. sen., of the first part, S. F. jun., of the second part, and J. H. H. of the third part, it was agreed, that S. F. sen., should retire from business, and S. F. jun., and J. H. H. become partners; that the capital employed should be £36,000.

£24,000 of which S. F. sen., should advance for S. F. jun., and £12,000 was to be advanced by J. H. H. The deed then proceeded, "And whereas an account of all the debts of S. F. sen., in his business of merchant, has been this day taken, and the balance in his favour amounts to £38,033, and whereas it has been agreed by and between S. F. sen., S. F. jun., and J. H. H., that the whole of the debts and credits of S. F. sen., shall be received and paid by S. F. jun., and J. H. H., and that the balance of £38,033 should be accounted for and paid by them in manner hereinafter mentioned; and S. F. sen., by indenture, hath assigned the debts and credits to them; this indenture further witnesseth, that it is agreed that in consideration of £12,000 paid S. F. sen., by J. H. H. and for raising £24,000 as S. F.'s jun., share of the capital, the sum of £36,000 part of £38,033 is to be retained by S. F. jun., and J. H. H. and the remaining £2,033 paid to S. F. sen., by instalments, at six, twelve, and eighteen months; and if any of the debts shall prove bad, the loss shall be borne by S. F. jun., and J. H. H.;" held, that this deed amounted to a covenant by S. F. jun., and J. H. H. to pay the debts due from S. F. sen. in his business, at the date of the indenture. In the case of *Sampson v. Easterby*, it appeared, that the lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor, and the owners of the other two-thirds, for pulling down an old smelting mill, and building another of larger dimensions, and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build it; held, that such covenant was to be implied, and that the lessor of the one-third might sue upon it in respect of his interest. The case of *Berry v. Claudet*, should also be consulted, as though no decision was given, the arguments, particularly of the late Sir W. Follett, deserve particular attention.

Mutual Covenants, &c.—As before stated, whenever it can be plainly collected from the whole tenor of a deed that such and such a thing must have been the intention of the parties, the law will consider this as a covenant. Besides the instances before given, the following may be noticed. Thus, if A. covenant with B., that on B. conveying to A. a certain piece of land, he will pay B. the sum of £20, there arises a covenant on the part of A. to pay the £20. This is quite clear. But the question is, does a covenant to convey arise, or was, in fact, the transaction mutual? Such would be the case if it can be collected that the intention was so. That is, if it were the intention of the parties that the transaction should be mutual, it would be so considered. The distinction is this, if the clause be introduced by way of mutual agreement, as if the language be, "it is hereby agreed that if A. pay £20 to B., B. shall convey

the land" or the converse, this would be clearly a covenant by each to do his part, namely, to exchange the land for the money. It is as much A.'s covenant as B.'s. If the agreement be merely that A. shall pay £20 to B. on his conveying the land, there is no authority which goes the length of saying that B. is bound, unless, indeed, the deed should show the intention of the parties to have been that they should be reciprocally bound. For this, see *Pordage v. Cole*, 1 Will. Saund. 319b. There the agreement contained the words "it is agreed between Pordage and Cole," and it was held that there was a mutual remedy (see Selw. N. P. 114, 11th edit.). It would be different if the words were those of the defendant only. Let us suppose that a lessee covenants that he will, at all times, during the term, plough, &c., the demised premises, "except the rabbit-warren and sheep-walk." If we consider this as an affirmative covenant, we must construe the word "except" to be "but not," and then, clearly there would be a negative of ploughing. Though a covenant may contain an exception, it does not, therefore, negative that of the body of the covenant. Thus, if a lessee covenant to repair, insure, &c., other than Nos. 4 and 5, the lessor does not, therefore, covenant to repair or insure those houses. But if there be any thing in the nature of the stipulation which is not a proper subject of an affirmative covenant, then it amounts to a covenant that it shall not be done. The case of the Duke of St. Albans v. Ellis (16 East, 352) will illustrate these observations. Here there was a covenant by lessee that he would, at all times, during the term, plough, sow, manure and cultivate the demised premises (*except the rabbit-warren and sheep-walk*) in a due course of husbandry. It was held, that if the lessee plough the rabbit-warren and sheep-walk, covenant lies against him. Lord Ellenborough said, that the court thought that the object of introducing the exception (which is as much a covenant or agreement as the rest of the stipulation in which it was placed) was to obviate a conclusion which might otherwise be drawn from the generality of the antecedent words, that the duty of the lessee extended to the ploughing, &c., all the demised premises, including the rabbit-warren and sheep-walk, and to declare that they should not be so dealt with, and not only to obviate that conclusion, but to negative the doing thereof; or, in other words, to agree that it should *not* be done; considering the words, "except the rabbit-warren and sheep-walk," in this place, as tantamount to the words "*but not* the rabbit-warren and sheep-walk;" which would have imported more directly, perhaps, a negative of ploughing the rabbit-warren and sheep-walk. "But by whatever words we collect an agreement that the thing should not be done, we collect enough to make an action of covenant maintainable for the doing of it."

Covenant from intention—"Subject to covenants in original lease."

—It must be borne in mind, that in equity, what is intended by the parties to be done is considered as actually done. Thus, if A. lease for years by indenture for the residue of the term subject to payment of rent and performance of the covenants in the original lease, has A. covenanted to pay the rent? Remember the parties are lessee and assignee. It cannot be intended that the assignee should not pay. We must then see what is the nature of the transaction, the circumstances and position of the parties, &c., and apply to them the terms of the deed. This would lead naturally to the conclusion, that one of them should be exonerated, and the other be liable. Therefore, there is nothing in the relation of the parties to the contract to prevent the conclusion that the assignee covenanted with the assignor (the lessee) to do what the clause in effect states. The result is, that by the words used, the assignee covenants to pay the rent and perform the covenants in the original lease. It may be here observed, that it is very commonly said in our books, that an assignee is liable only whilst he continues assignee (Broom's Part. Actions, 134, 135, 2nd edit.; Woodfall's Landl. and Ten. 173, 4th edit.; Selw. N. p. 488, n. 33, 10th edit.: Short v. Kalloway, 11 Adol. and Ellis, 28; Burnett v. Lynch, 5 Barn. and Cres. 589, 605). This no doubt is true, but the student must not forget that as the assignment of a lease (though followed by the lessor's acceptance of rent from the assignee) does not discharge the lessee from his *express* covenants, it is usual for the assignee to give him an indemnity against these covenants, either by bond, or, which is more frequent, by a covenant inserted in the assignment itself. This deed, however, is commonly in the custody of the covenantor (the assignee) and a bond is, therefore, sometimes preferred. The benefit of this *express* covenant is, that the liability is not got rid of by assigning over, whereas the *implied* obligation of the assignee to indemnify the lessee only extends to breaches committed during the assignee's possession (see Woolveridge v. Steward, 3 Moore and Sc. 561; S. C. 1 Cr. and Mees. 644; Harley v. King, 2 Cr. Mees. and Rosc. 18).

Marriage—Prohibited degrees.—The case referred to in vol. vi., p. 54, as relating to the 5 & 6 Will. 4, c. 54, is Reg. v. Chadwick, 12 Jurist, 174.

Execution—Debt under £20.—The case of Newton v. Lord Conyngham, referred to in vol. vi., p. 258, is reported in 12 Jurist, 356.

(To be continued).

MICHAELMAS TERM EXAMINATION ANSWERS.

(Concluded from p. 117.)

The questions to which the following answers relate will be found in vol. vi. LAW STUDENT'S MAGAZINE, O. S., pp. 492—493.

BANKRUPTCY.

I. *Discharge of bankrupt and insolvent.* — The principle of the bankrupt laws is to enable an honest trader to give up all his property for *equal* distribution amongst his creditors, and thereafter to obtain for himself a complete discharge from the claims of his creditors. In bankruptcy, the effect of the certificate is to discharge the bankrupt's person and future property, whereas in insolvency the discharge only extends to protect his person, leaving his future acquired property liable, through the medium of the judgment on the warrant of attorney. This is the great distinction between bankruptcy and insolvency (First Book, 265). And even where the future acquired property is not attainable by execution on the judgment, the Insolvent Court may be applied to for an order to compel satisfaction (see arg. in *Whatford v. Moore*, 12 Jur. 47).

II. *Adjudication, how obtained.* — In order to obtain an adjudication of bankruptcy, proof must be given of trading, an act of bankruptcy, and a good petitioning creditor's debt (5 Law Stud. Mag. 44).

III. *Traders liable to bankrupt laws.* — The following persons are by the 5 & 6 Vict. c. 122, s. 10, rendered liable to the bankrupt laws, who were not so previously, namely, livery stable keepers, coach proprietors, carriers, ship owners, auctioneers, apothecaries, market-gardeners, cow-keepers, brick-makers, allum-makers, lime-burners, and millers. See also 7 & 8 Vict. c. 111, as to members, &c., of trading companies (see 2 Law Stud. Mag. 368, 369).

IV. *Compulsory act of bankruptcy.* — A compulsory act of bankruptcy may be obtained by serving a demand for payment of a debt, and non-payment, or security for same, within a limited time. This is under 1 & 2 Vict. c. 110, s. 8, and 5 & 6 Vict. c. 122, ss. 11—19. (see 2 Law Stud. Mag. 474, 475 ; 6 *Id.* 99).

V. *Member of Parliament.* — The course to be adopted for obtaining an adjudication against a member of Parliament is pointed out by the 6 Geo. 4. c. 16, ss. 10, 11, which provide, that if a trader, being a member of Parliament, and personally served with a summons (founded on a previous affidavit of debt) in an action for recovery of a debt of such amount as shall be sufficient to support a

fiat in bankruptcy, shall not, within one calendar month, comply with the process; or if, being personally served with a peremptory order from a court of equity, or of bankruptcy, or of lunacy, to pay any sum of money, he shall neglect to do so, he shall be deemed to have committed an act of bankruptcy (First Book, 20).

VI. *Property vesting in assignees.*—The title of the assignees to a bankrupt's estate has reference back to the period when the trader became a bankrupt, *i. e.* from the time when he first committed an act of bankruptcy after the accruing of the petitioning creditor's debt, except under the circumstances stated in answer, No. xi. It actually vests at the time of their appointment, which now by itself vests all the estate in the assignees, except, indeed, estates tail, copyholds, and leases (see Princ. Com. Law. 108—111; 6 Law Stud. Mag. 362).

VII. *Leases of bankrupt.*—The bankrupt's leases do not pass by the mere appointment of the assignees, at least, not so as to render them liable thereon. The assignees may repudiate or accept such property (see 6 Law Stud. Mag. 250, 385; Princ. Com. Law, 108—110).

VIII. *Property subsequent to fiat.*—Where a bankrupt becomes entitled to property by descent, devise, or bequest after the date of the fiat, and prior to his certificate, his assignees will become entitled to it; but if it be after certificate, then the bankrupt will take it free from his creditors under the fiat.

IX. *Property of third person — Reputed ownership.*—In certain cases the property of strangers left in the bankrupt's possession may vest in the assignees, it being enacted by 6 Geo. 4, c. 16, s. 72, that where the bankrupt shall, by consent of the true owner, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or had taken upon himself the sale, alteration, or disposition as owner, they shall be disposed of, together with the bankrupt's own goods and chattels, under the fiat for the benefit of his creditors (see 6 Law Stud. Mag. 862).

X. *Mortgagee's rights.*—If a mortgagee of a bankrupt's property have a power of sale, he should go before the commissioners, state the accounts, and obtain their direction to sell. In this case if the amount of his debts be not realized, he may prove for the deficiency; but if he has sold of his own mere motion he must abide the consequence, and cannot prove for any deficiency. If there be no power of sale, an order from the Vice-Chancellor in bankruptcy will be necessary (see 5 Law Stud. Mag. 293—295).

XI. *Conveyance by bankrupt prior to fiat.*—Formerly the title of the assignees referred back to the act of bankruptcy, so as to avoid intermediate transactions, whereby innocent persons were often great losers. But by the 2 & 3 Vict. c. 29, all contracts, dealings,

and transactions, by or with any bankrupt, really and *bond fide* made and entered into before the date and issuing of the fiat against him, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person or persons so dealing with such bankrupt had not, at the time, notice of such act of bankruptcy. And even if he had notice, by the 2 & 3 Vict. c. 11, (see also 5 & 6 Vict. c. 122, s. 7.) his *bond fide* purchases cannot be impeached after twelve calendar months from the act of bankruptcy.

XII. *Consent to suit in equity or arbitration.*—No consent is necessary before the assignees bring an action at law, but it should be obtained before filing a bill in equity, or referring to arbitration. The assignees should insert an advertisement for a meeting of creditors, the major part of whom in value then present, may authorise the proceedings; or if one-third in value do not attend, the commissioner may authorise the assignees to proceed (see *Pract. Equity*, p. 39, 42).

XIII. *Trustee bankrupt.*—Where a trustee becomes bankrupt, having trust property, or stock, &c., the Vice-Chancellor in bankruptcy may, on petition of the *cestui que trusts*, after notice to all parties, order the assignees and all other necessary persons, to convey, assign, or transfer the trust property to some other person, upon the same trusts as the property was subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect; and also to receive and pay over the rents, dividends, and produce thereof (6 Geo. 4, c. 16, s. 79; 7 Jur. 430; Burton's *Comp.* 214 a).

XIV. *Lease, covenant not to assign.*—Though a lease contain a covenant not to assign, yet if the lessee becomes a bankrupt, his assignees are not bound by such a covenant, but may assign over the lease. And even if the bankrupt should himself take from his assignees, he would not be prevented from subsequently assigning over (see *Princ. Com. Law*, 110; also, 8 Term Rep. 57, as to general principle).

XV. *Discharging bankrupt from custody.*—By the 11 & 12 Vict. c. 86, a commissioner may order the discharge of a bankrupt who may be in prison for debt at the time of obtaining his protection, or is in execution under a *capias* after a certain term of imprisonment (see 1 *Law Stud. Mag.*, N. S., No. 2, "Recent Statutes").

CRIMINAL LAW.

I. *Modes of prosecution.*—Criminal offenders may be proceeded against by presentment of a jury, or more usually, by indictment in the first instance, or by an information (see *First Book*, 424, 425).

II. *Forgery.*—The common law offence of forgery is a misde-

meanor, as may be deduced from the punishment stated in 4 Black. Com. 248 (see Bacon's Abridgment, tit. "Forgery").

III. *Procedendo*.—The writ of procedendo issues to send back an indictment improperly removed from an inferior to a superior court (Com. Dig. tit. "Certiorari" G; 1 Salk. 144).

IV. *Assault*.—A party assaulted may bring an action at law, or may proceed summarily before a justice (Prin. Com. Law, 161, 171), or may take proceedings in the county court, or may indict the party (First Book, 391; 4 Steph. Com. 163—165, 2nd edition).

V. *Declaration in lieu of oath*.—A declaration has been established by the 5 & 6 Will. 4, c. 62, in the place of voluntary oaths, and it is provided that any person authorised to administer an oath, may take and receive the declaration of any person voluntarily making the same in the form given in the schedule to the act. By the 8 & 9 Vict. c. 48, a declaration by a bankrupt or his wife is substituted for an oath. To the validity of the substituted declaration under the 5 & 6 Will. 4, c. 62, it is essential that it should be made for the confirmation of written instruments or allegations, or proof of debts, or of the execution of deeds, or other similar matters, or else that it relates to matters within the other sections of the same act, or some of the subsequent acts containing similar clauses.

VI. *Articles of the Peace*.—Articles of the peace are exhibited in court, supported by the affidavit of the exhibitant (see Bacon's Abr. tit. "Surety of the Peace;" 4 Steph. Com. 341; First Book, 407, 408).

VII. *Criminal offenders*.—We really cannot state for certain what the examiners are aiming at in this question. Criminals may be said to be traitors or felons, and sometimes misdemeanants are so called, or offenders may be said to be either principals or accessories, as to which see 1 Law Law Stud. Mag., N. S., p. 9.

VIII. *Disobeying statute*.—The disobedience of an act of Parliament, or the violation of it, is an offence of itself, punishable on an indictment by fine and imprisonment (4 Steph. Com. 258, 2nd edit.; 7 Bacon's Abr. tit. "Statute," K. p. 466, 7th edit.).

IX. *Certiorari*.—A certiorari may be granted at the instance of either the prosecutor or the defendant; and the former was once entitled to demand this as a matter of right, though the application of the latter was dependant on the discretion of the court. But now by 5 & 6 Will. 4, c. 33, no certiorari shall issue at the instance of the prosecutor or any other person (except the Attorney-General), without motion first made in the Court of Queen's Bench, or before some judge of that court, and leave obtained, in the same manner as where application is made on the part of the defendant; and moreover the defendants shall, before the allowance to them of any writ of certiorari, enter into a recognizance before a judge of the Queen's

Bench or justice of the peace, in such sum and with such sureties as the court or a judge may think fit, and with such conditions as are contained in the previous statutes 5 & 6 Will. and Mary, c. 11, and 8 & 9 Will. 3, c. 33, passed in relation to the same subject.

X. *Central Criminal Court*.—By the 4 & 5 Will. 4, c. 36 a new court was established for the trial of offences in London, Middlesex, and certain suburban parts of Essex, Kent, and Surrey, to be called the Central Criminal Court. And it is provided (s. 2), that the Crown may issue its commission of oyer and terminer, and gaol delivery to such court, and that the judges of the court, or any two or more of them, shall hold a session for London and Middlesex, and the parts of Essex, Kent, and Surrey before mentioned, in the City of London or suburbs thereof, at least twelve times in every year (and oftener if need be), such times to be fixed by general orders of the said court, which any eight or more of the said judges of the courts of Westminster are empowered from time to time to make. The proper venue in an indictment at this court is, "Central Criminal Court, to wit," with an allegation in the body of a county where the offence was committed (14 Law Journ., N. S., M. C. 82; 9 Jur. 593).

XI. *Witnesses—Subpœna*.—The attendance of witnesses on trials in criminal cases is enforced by subpœna. Before magistrates, the attendance may be compelled by summons, on which, in case of neglect, a warrant may issue, and a warrant may sometimes issue in the first instance (First Book, 411, 421).

XII. *Trial of peers*.—When peers are charged with felony they are tried before the Lord High Steward (First Book, 467). In cases of misdemeanours, peers are tried like other persons (4 Steph. Com. 351, 2nd edit.).

XIII. *Habeas corpus*.—There are several writs so called, but the great writ is a *habeas corpus ad subjiciendum* (9 Jur. 393), which is the remedy used for deliverance from illegal confinement. It may be obtained on motion in court, or in vacation by judge's order, on an affidavit of facts (Burrows, 606).

XIV. *Offences at sea*.—Offences at sea are tried before the ordinary courts of oyer and terminer and gaol delivery, and the Central Criminal Court (First Book, 469; 4 Steph. Com. 358—360).

XV. *Accessories*.—It will be sufficient to refer the reader to 1 Law Stud. Mag., N. S., p. 9, for an answer to this question.

CORRESPONDENCE.

Judgments (vol. vi., p. 467).

SIR, — In your MAGAZINE for November, under the head of “Judgments,” in the portion set apart for *Correspondence*, is the following observation :—

“That as against *bond fide* purchasers and mortgagees since the registered judgment, but *without notice* of it, the judgment creditor can only take a moiety of the debtor’s land.”

From the expressions in Mr. Sugden’s *Vendors and Purchasers*, 11th edit., pp. 664, 665, *et seq.*, I am not able to come to the conclusion that *even a moiety* of the debtor’s lands are liable to a registered judgment in the hands of a *bond fide* purchaser *without notice*.

By the 2nd of Vict. c. 11, s. 5, a judgment shall not bind any lands in the hands of a purchaser *bond fide, without notice*, more extensively in any respect, *although duly registered*, than a judgment, &c., would have bound such a purchaser previous to the act of 1st and 2nd Vict. where it had been duly docketted.

Upon this Mr. Sugden observes, “that it appears to render a purchaser *without notice* safe in such cases, for under the *old law* a judgment, although duly docketted, would *not* have bound *such* a purchaser, and therefore he is *now* equally protected.” He also says, speaking of *trust estates* (which are liable to judgments under the existing law, in the same manner as estates held in a man’s *own right*), “That if the legal fee were vested in A. in trust for B., and they were to convey to a purchaser, he would be bound by any judgment entered up against B. the seller ‘before the conveyance, just the same as if the latter had himself had the legal estate.’ *But if he were a purchaser without notice he would under the 2nd Vict. c. 11, s. 5, hold free from the judgment, execution upon which could not be sued against him.*”

From this decided statement I cannot consider that I am at liberty to conclude that, under the circumstances above stated, in case of *no* notice, execution could be sued against *a moiety* of the debtor’s lands; the words of Mr. Sugden are, “that he *holds free from the judgment*,” meaning, I should suppose, *altogether free*.

The point being one of some importance I must beg that assistance which you are at all times so ready to give, to further the interests of the artied clerk.

I am, &c.,

B. A.

NOTE.—Were the construction of the 2 Vict. c. 11, s. 5, such as our correspondent says Sir Edward Sugden states it to be, namely, that a purchaser without notice of a registered judgment was not bound by it to any extent, it would be a matter of surprise. But it is clear Sir Edward Sugden does not mean this, for he says that the effect of the act (of which he was the originator) is that judgments against purchasers without notice will not bind *further* than a judgment would have bound such a purchaser before the 1 & 2 Vict. c. 110, where it was duly docketted. Now it is quite clear that prior to the 1 & 2 Vict. c. 110, a docketted judgment *did* bind a purchaser, and that as against him a moiety might be extended under an elegit, though he were a purchaser without notice, and for full value (see Tidd's Pract. 935, 939, 9th edit.). In fact there can be no doubt on this point. It, therefore, suggests itself that Sir Edward Sugden is speaking of some peculiar case, and on attentively reading the pages referred to, we do not doubt but that our correspondent and others will see the doctrine is confined to the peculiar cases there stated, as, indeed, is indicated by the concluding words: "appears to render a purchaser without notice safe in *such cases*." In fact, Sir Edward Sugden is speaking of judgments after payment of the purchase money but *before* the actual execution of the deed, which did not even formerly bind the purchaser (1 P. Williams, 278; 2 Eq. Cas. Abr. 683; 2 Tidd, 935, 9th edit.). So Sir Edward Sugden is right as to trust estates, and that because by the old law the purchaser could not have been affected where the trustee conveyed by the direction of the *cestui que trust before execution sued* (Com. Dig. tit. "Execution," C. 14; Tidd's Pract. 1035, 1036; 29 Car. 2. c. 3, s. 10; 4 Bing. 335).

We trust we have explained ourselves to the satisfaction of our correspondent. We think some of our readers will be thankful to him for calling attention to the matter, as it must be confessed that Sir Edward Sugden is by no means so precise as could be wished in pointing out the various distinctions.—Eds.

MOOT POINTS.

No. 1.—*Manor—Sale of Demesne Lands.*

If A. the owner of a manor, and of demesne lands within and parcel of the manor, aliens the demesne lands, so as to make a severance of them from the manor—

Will the manor thereby become destroyed?

And what is understood by a reputed manor ?

THOMAS M. HEALD (Wigan).

No. 2.—*Devise.*

A devise was made generally to B. without words of inheritance before the statute 1 Vict. c. 26, on paying the testator's debts.

Will a fee pass to the devisee on account of the charge imposed on him ?

THOMAS M. HEALD (Wigan).

No. 3.—*Title Deeds.*

A. the owner of an estate conveys a close of land, part of the estate, to B. B. on his purchase takes an attested copy of A.'s purchase deed only, and a covenant from A. to produce all the original deeds. B. afterwards contracts with C. for sale to him of a plot of land, part of the said close, and agrees to make a good title at his own expence to C.

Can C. insist upon attested copies of all the original title deeds from B. at B.'s expence ?

THOMAS M. HEALD (Wigan).

No. 4.—*Trusts—Receipts.*

In a marriage settlement power is given to the trustees (*four number*) to sell, with a declaration that the receipts of the trustees should be a good discharge to the purchaser for his purchase-money.

A sale is made and a conveyance in pursuance of the power is executed by all the trustees, and the other necessary parties ; but the receipt for the purchase-money is signed by only two of the trustees.

Is this a valid conveyance to the purchaser, and the receipt sufficient ?

THOMAS M. HEALD (Wigan).

No. 5.—*Grant—Exception of Trees.*

C., by letters patent, granted to E. certain lands, parcel of his manor or lordship, out of which letters patent, all great trees, woods, underwoods, &c., growing upon the premises, are excepted, and reserved to C., his heirs, and successors.

Query.—Can the present proprietor of the lands granted by the above letters patent, plant trees or timber thereon, and afterwards fell and cut down the same for his own use, or would such timber be considered to fall under the exception and reservation ?

THOMAS M. HEALD (Wigan).

No. 6.—*Will—Devise—Construction.*

P. by her will gave and bequeathed to her niece L. all her cottages, lands, tenements, and hereditaments lying and being in B.

To hold to her for her life, and after her decease to the lawful issue of her body, and if only one child should be living at her death, then to such child and his or her heirs; and in case she left more than one, then to such children, to be equally divided, share and share alike, and to their heirs as tenants in common and not as joint tenants.

Query.—Is M. solely entitled to the estates as the surviving child of testatrix's niece (L.) living at her death; and can he make a good title to the purchaser; or, are the daughters of her eldest son, as heirs of her body, entitled to the whole, or as issue of her body to a part with their uncle?

Does testatrix's niece take an estate tail, or for life under the will, as in the former case her husband would be tenant by the curtesy?

THOMAS M. HEALD (Wigan).

No. 7.—*Highway—Right to Repair.*

A. laid an information against B. and C., surveyors of R., under 5 & 6 Will. 4, s. 94, before the magistrates, alleging that a certain length of a highway was in want of repair, and praying that they might be summoned, and that such proceedings might be had in the premises as the law directs; B. and C. in answer to the information alleged that they were not liable to repair the highway in question, because the inhabitants of another township (T.) had from time immemorial repaired the road. Upon this the magistrates took the course prescribed in the act, ordering that the parties named in the information should be indicted at the next sessions.

The officers of T. acting under advice gave notice to the surveyors of R. that they would not from the date thereof "pave or otherwise repair that part of the highway in R. and hitherto paved and repaired by the said township of T."

The question then remaining is, whether there ever was such a consideration given as would relieve from the common law liability of R. to repair the road and throw the burthen upon T.; or is the custom of itself sufficient to confirm the burthen on that township?

The traditionary consideration for which the inhabitants of T. originally agreed to maintain the road is, that they had in old times no road southwards, leading to a market town in that direction, except by going a road a considerable round. For this reason T. proposed to repair the road.

The only evidence of any agreement which can be procured is that of an old man who told several of the inhabitants of T. that if the arrangements were to be made again he would have required them to repair a much greater portion.

Attention is requested to the case of *R. v. Inhabitants of the*

parish of St. Giles's, Cambridge, 5 M. and S. 260, which appears very strong against R.

Is the custom good *per se* without more?

Is the alleged consideration, if proved, sufficient to sustain the custom?

Would hearsay from old persons deceased be admissible?

And inasmuch as the old inhabitants of R. are the persons who know most on the subject—if the indictment proceeds are they, being ratepayers, rendered competent to give evidence by sect. 100 of the new Highways Act? THOMAS M. HEALD (Wigan).

No. 8.—Covenant—Joint and Several—Action.

A. and B. as his surety in a lease, covenant jointly and severally with C. and D. their heirs, &c., and also with E. and F. their heirs, &c., for payment of certain rent thereby reserved and made payable.

C. and D. are trustees of the equity of redemption. E. and F. are mortgagees in possession.

Query.—Can an action be maintained on this covenant at the suit of E. and F. without C. and D. joining, against A.?

THOMAS M. HEALD (Wigan).

No. 9.—Devise—Sale—Division of Trust Moneys.

A. by her will in the year 1841, gave and devised her real and personal estate to trustees to be sold, and directed them to stand possessed of the trust moneys arising thereby. *Upon trust* to divide the same equally amongst "all and every and such of my next of kin as shall be of the same or a nearer degree of relationship than S. and A. children of B. G., H., P., and Q., children of R. (save and except N. and T. his sister), and the children of such of them that may be then dead, leaving lawful issue, such issue nevertheless only to take a parent's share amongst them."

Testatrix died leaving no nearer kin than first cousins, children of her deceased uncles and aunts: of this degree were said B. and R., and consequently their respective families were *first cousins once removed* to testatrix.

Testatrix at her death had four cousins living, who were F., G., N. (who has died since testatrix), and T. being of "a nearer degree of relationship than S., A., G., H., P., and Q.," and their children each claim an original share as being "of the same degree of relationship" as S., A., G., &c.

1st. Does the circumstance of F. and G. having survived testatrix exclude their children from being entitled to original shares?

2nd. In the case of N. and T.'s children, they being of the same degree of relationship as S., A., G., &c., will they be entitled to

shares notwithstanding the exception therein of their parents who survived testatrix ?

3rd. Are S., A., G., &c., entitled to original shares under the words of the will ?

THOMAS M. HEALD (Wigan).

No. 10.—*Mortgage—Administration.*

Mortgagee in fee dies in 1837, making a will in 1827 (to which there were no witnesses), whereby he "gave and bequeathed all the property of whatsoever description he might die possessed of, where-soever and of what nature or kind soever, to his father and mother (whom he appointed executor and executrix), the interest arising from the same to be enjoyed by them for their lives, and at their decease the principal to be divided between such of his brothers and sisters as might then be living." The father died previous to testator, and the mother died in 1848, who proved the will. Both the father and mother died intestate. There are two brothers and a sister of mortgagee. The mortgage is to be paid off but it is insisted that administration *cum testamento annexo* be taken out, but this is refused, alleging that the mortgage money must be considered in the nature of a specific legacy, and the enjoyment of the interest by testator's mother for eleven years (except one-half year's interest received by the brothers and sister since their mother's death), must be held to amount to an assent, so as to vest the property in them as legatees in remainder; on the other hand reference is made to Shep. Touch. p. 457. The brothers and sisters say, they are ready to give discharges, and that the heir-at-law is ready to re-convey.

The question is—are letters of administration *cum testamento annexo* necessary ?

J. S. G.

No. 11.—*Mortgage—Sale—Surplus.*

A. by deed, mortgages premises to B. for securing the payment of a sum of money advanced by B. to A., which deed contains the usual power of sale, in case of default being made in payment of the principal money and interest, at the time therein specified, with a proviso that the surplus produce of the sale should be paid to A. his executors or administrators.

A. afterwards died, and having in his lifetime made default in payment of the principal money and interest, B. caused the premises to be sold by public auction.

Will the surplus of the sale (after deducting all expenses) be considered as part of A.'s real or personal estate ?

J. D. NORWOOD.

No. 12.—*Chancery Suit—London Agent's Lien on Papers.*

C. employs D. a country solicitor to defend a suit wherein he C. is a defendant. D.'s agents in town conduct the proceedings there, and no communication takes place between C. and the London agents of D.

C. wishes to move his papers from D. and set the costs off against his claim upon him. D. accordingly applies to his agents for C.'s papers who refuse to part with those in their hands until their lien for the costs incurred by them in that particular suit be discharged.

Can the London agents enforce such lien to the prejudice of C.?

G. L. C. (Nottingham).

NOTE.—See PRACTICE OF EQUITY, p. 22—24.

No. 13.—*Declaration of Trust—Vesting of Share.*

By a deed of declaration of trust between A., B., and C. (children of J. B. by his first wife S.) of the first part, Y. (widow of said J. B.), of the second part, and certain trustees of the third part, it was declared that the trustees should be possessed of a sum of £4,000 stock then standing in their names, "Upon trust to pay to or permit the said Y. to receive the dividends during her life." *After her decease* then in case her son T. by the said J. B. (a minor), should be still in his minority, "Upon trust to continue invested so much of the aforesaid sum as at the time of the death of said Y. should be equal to the sum of £2,000 until T. attained twenty-one, when it should be a vested interest in him, and immediately after attaining that age said £2,000 was to be paid to him, his executors, and administrators." In case he should die *under twenty-one* then the trustees were to stand possessed of said £2,000, "In trust for the persons entitled to the residue of said £4,000, but in case said T. should have attained twenty-one at the death of said Y. to pay said £2,000 to T., his executors, administrators, or assigns."

T. attained *twenty-one* but died in the *lifetime* of Y.

A., B., and C. are the parties entitled to the remainder of the £4,000 stock, and they now claim the whole of it in consequence of the death of T. during the life of Y., contending that T.'s interest was not to become a vested one unless he not only attained twenty-one, but also survived the tenant for life (Y.).

The representatives of T. also claim the £2,000; who are entitled?"

G. P.

ANSWERS TO MOOT POINTS.

No. 37.—*Bankruptcy*.—*Voluntary Conveyance* (vol. vi. p. 343).

I think this answer of Mr. J. D. Norwood not very satisfactory, for in the case of *Lister v. Turner*, 5 Hare 281, the court avoided laying down such a rule, *i. e.*, the creditor obtaining a judgment, and perhaps the case of *Colman v. Croker* would not now be followed. If the settlor be made bankrupt, or an insolvent debtor, the assignees represent creditors for all purposes; and if there be any fraud, the assignees may take advantage of it (see *Doe dem Grimsby v. Ball*, 11 Mees. & W. 331; *Norcutt v. Dodd*, 1 Cr. & Phil. 100).

J. S. G.

No. 79.—*Partnership* (vol. vi. p. 388).

Your correspondent seems to have overlooked the fact of an answer to this point having already appeared in the pages of our *MAGAZINE* (vide 3 Law Stud. Mag. p. 46, vol. iv., p. 51), and to which I beg to refer as being the answer to the point in question.

W. W. TATTERSALL.

No. 87.—*Mortgage* (vol. vi. p. 429).

I am of opinion that D. the last mortgagee, without notice, may, by purchasing the first incumbrance, protect himself against the mortgage to C., for by purchasing the first mortgage he obtained the legal estate, and he had equal equity with C. the *mesne* incumbrancer, by having lent his money without notice of his charge; and notice of the *mesne* incumbrance at the time of buying in the first mortgage will not vary the case (*Bovey v. Skipwith*, 1 Ch. Ca. 201; *Churchil v. Grove*, *Ibid.* 35; 1 Vern. 187, 88; 12 Ves. 573; *Hagshaw v. Yates*, Str. 240). But the possession of the legal estate will not make up for the want of equal equity, and notice of a prior charge at the time of the subsequent advance will make the equities of two incumbrancers unequal. Where a person advances money on an estate which he knows to be already encumbered, he in effect acknowledges that he will claim subordinately to the person who has the prior charge, and, therefore, it may be laid down as a general rule, that if the subsequent incumbrancer have notice of the preceding incumbrance *before* he becomes possessed of his own security, nothing he can do will help him (vide 2 Ves. 485, 684; see also 2 Cru. Dig. Ch. 5, ed. 1835).

E. S. R.

HILARY TERM EXAMINATION QUESTIONS.

COMMON LAW.

I. What are local and what are transitory actions? II. Are there any and what persons who cannot bring actions in their own names; and how are they to proceed to recover damages for an injury? III. In case of an injury to a person, from which death ensues, is there any mode by which compensation can be sought, and by what means, and by whom and against whom must it lie? IV. What are the several periods of limitations of actions? V. How long does a writ of summons remain in force? VI. When is a writ of distringas issued, and how can it be obtained? VII. State some of the usual defences to an action, and the mode of making them, by plea or otherwise? VIII. Is there any and what property that cannot be taken in execution? IX. What is the rule as to attesting cognovits and warrants of attorney? X. State what are the usual matters referred by the court to one of the Masters. XI. Describe some of the proceedings termed "interlocutory," and how are questions thereon decided? XII. If a landlord lets a house by parol for three years, and nothing is said as to repairs, state what repairs each party would be liable to, and what would be dilapidations on the part of the tenant? XIII. State the cases in which you are compelled to sue under the New County Courts' Act, and how and where the suit may be brought; and where must the respective parties be residing at the time? XIV. Will any privilege protect a person from being sued in the new county courts; and would the same privilege allow the party to sue in the superior courts for a debt that might be recovered in this court? XV. Under what circumstance may a party sue in the superior courts for a debt recoverable in the new county courts?

EQUITY.

I. State some of the cases in which a court of equity exercises control over proceedings in the courts of law, and the mode in which such control is usually exercised? II. Under what circumstances will a court of equity supply defects in the substance or in the execution of deeds executed? III. What rules do courts of equity observe regarding the enforcement of contracts entered into by infants, married women, and lunatics respectively? IV. State the nature and objects of a bill of interpleader, and what is specially required upon the filing of such a bill. V. In what circumstances should recourse be had to a bill to perpetuate testimony; and in what cases is it that evidence

taken under such a bill cannot be afterwards used? VI. State the nature and objects of a bill of discovery, and what is the rule regarding the costs of such a bill? VII. What is the effect upon the remedies of creditors of a decree in a creditors' suit? VIII.—In what cases is service of a subpoena upon the party required, and in what cases may it be served upon the solicitor of the party? IX. If a defendant, having been served with a subpoena to appear to and answer the bill, do not appear in due time, what are the steps which the plaintiff should take? X. In what cases is it unnecessary for the plaintiff to require a party defendant to appear to and answer the bill, and what is the practice in such cases? XI. Where a party defendant is served with a copy of the bill, and is not required by the plaintiff to appear to and answer the same, in case such party defendant desires the suit to be prosecuted against himself in the ordinary way, what steps must he take, and what is the rule regarding his costs? XII. Under what circumstances can a plaintiff, desirous to amend his bill, obtain an order of course for leave to amend; and if he apply for a special order, what is the effect of the affidavit he must make? XIII. What is the effect of a traversing note? XIV. State the proceedings which may be taken for enforcement of an order of the Court of Chancery directing a party to pay a sum of money. XV. What is the proper course to be pursued when a party is not satisfied with the Master's decision—having reference to what should be done both before and after the report?

BANKRUPTCY.

I. When were the three principal statutes now in force for consolidating and amending the laws relating to bankrupts, and for establishing a court of bankruptcy, respectively passed? II. State generally the description of persons subject to the bankrupt laws; and say whether those laws do or do not extend to aliens, to denizens, and to women? III. Are peers of the realm and members of the House of Commons liable to the bankrupt laws?—and are there any circumstances under which an executor or trustee, an infant, or a married woman, can be made a bankrupt? If so, state the circumstances in each case. IV. Can a second fiat in bankruptcy be prosecuted against an uncertificated bankrupt? If not, why not? V. What steps must a creditor take in order to make a trader debtor under the 1 & 2 Vict. c. 110, and 5 & 6 Vict. c. 122; and what amount of debt is necessary, in either case, to enable the creditor to avail himself of the provisions of the act? VI. What is the mode of proceeding to obtain a fiat in bankruptcy; and what are essential requisites to sustain a fiat? VII. Are any and what persons incompetent as witnesses to prove the constituent parts of the bankruptcy? VIII. What is the lowest amount of debt which must be

due to a single creditor, or to two creditors (not partners), to sustain a fiat? IX. If, after a docket struck, a trader should pay or give security for the petitioning creditor's debt, what consequences would follow—1, as regards the fiat; 2, as regards the petitioning creditor? X. How, when, and by whom are the official assignees and the creditors' assignees respectively appointed; and what are their respective duties? XI. If one of several parties to a bill of exchange become bankrupt, to what extent can the holder prove and receive dividends under the fiat in respect of such bill? XII. What steps must be taken by a creditor who holds a mortgage security, in order to render his security available and prove for the deficiency; and is there any and what difference between the rights and remedies of a legal and those of an equitable mortgagee with, and one without writing? XIII. What is the general rule with regard to the effect of the bankruptcy upon the real and personal property of the bankrupt; and is there any, and what, exception therefrom with regard to property of which the bankrupt is lessee; and what course must the assignee pursue with regard to property of the latter description? XIV. What are the general rules with regard—1, to property of others which may be in the possession of the bankrupt; and 2, to property of the bankrupt which may be in the possession of others at the time of the bankruptcy? XV. What is necessary to be done by the assignee of a debt or other chose in action, and for what reason, in order to render the assignment effectual in case of the bankruptcy of the assignor?

CRIMINAL LAW.

I. State what constitutes the crime of burglary at common law; and is that offence extended, and in what respect, by statute? II. What description of false representation constitutes the offence of obtaining money or property by false pretences? III. State when the taking and fraudulent appropriation of property by one who had lawful possession of it, amounts to larceny; and give instances. IV. Define the offence of embezzlement, and state what evidence must be adduced in support of an indictment for such an offence. V. On an indictment and conviction for arson, does the punishment differ in cases where the premises are inhabited or not? VI. By what evidence is it necessary that the crime of perjury should be proved? VII. State the course of proceeding against a person accused of an offence, in order to bring him to trial. VIII. By what authority do justices of the peace exercise jurisdiction in criminal matters? IX. State the distinction between a petty session, a special session, and a general session. X. Are the times for holding these sessions, or either of them, fixed; and if so, by what authority? XI. Mention some of the duties of magistrates in such sessions respectively. XII.

If magistrates exceed their authority, what is the remedy of the party injured, and what preliminary steps should be taken? XIII. Is there any right of appeal in criminal cases, and what is the mode of proceeding to exercise that right? XIV. State what indictable offences are bailable, distinguishing those for which magistrates may take or refuse bail at their discretion, and those for which they must take bail? XV. What costs and expenses of a prosecution are allowed, and how are they defrayed?

CONVEYANCING.

I. A., by bargain and sale, or appointment under a power, conveys to B. and his heirs to the use of C. and his heirs; what estates do B. and C. respectively take? II. A testator bequeaths the residue of his personal estate to several persons as tenants in common; two of the residuary legatees die in the lifetime of the testator; what becomes of their shares? III. What course should an executor adopt for his own safety, who has in his hands a legacy to which an infant is entitled, there being no trustee under the will? IV. Can a person having an absolute power of appointment over real estate defeat judgments entered up against him subsequently to the vesting of such power in him, in any and what way? V. If the owner of an estate convey it in trust for the benefit of his family, and then sell it, is the purchaser entitled to it? If so, is there any exception to the rule? VI. Is a purchaser bound to take a conveyance executed by the attorney of the vendor under a power of attorney, with any and what form of condition? VII. Is the tenant for life or who else entitled to the custody of the title deeds? VIII. What is a defeasance, and in what cases is it usually required and executed? IX. Of what do great and small tithes usually consist? and what is a modus, and what a tithe rent-charge? X. What instruments can be stamped after they are executed, and on what terms? XI. When is real estate considered as personal, and personal as real? XII. Can a deed be altered after it has been executed by all or any of the parties? and if so, to what extent? XIII. Can a lessee for 999 years grant a lease for life? Give the reason for your answer. XIV. Can a mortgagee in possession whose estate is absolute at law, cut down timber? XV. Where a lessor brings an action of ejectment for non-payment of rent reserved by lease for want of sufficient distress on the premises, and obtains judgment and possession under an execution, can the lessee obtain relief at law or in equity?

HILARY TERM EXAMINATION ANSWERS.

COMMON LAW.

I. *Local and transitory actions*.—Actions are called local which must be tried in the very county in which they arose, whilst those which may be tried anywhere are called transitory actions (see First Book, 305).

II. *Persons incapable of suing*.—A feme covert cannot, in general, sue alone (Princ. Com. Law, 72, 73, 179); an infant must sue by guardian (6 Law Stud. Mag. 494); an outlaw cannot sue during the continuance of the outlawry (Iitt. s. 197, and note); neither can a person attainted (see Chit. Contr. 184, 3rd edit.).

III. *Compensation on accidental killing*.—An action may be sustained by the relations of the person killed against the party doing the act causing death (First Book, 387).

IV. *Limitations of actions*.—Actions on simple contracts must be brought within six years; on specialties within twenty years; for trespass to realty and of detinue, trover, and case, within six years; for trespass to person, within four years; and actions for slander must be brought within two years (see 6 Law Stud. Mag. 498; Princ. Com. Law, 294, 296, 302; First Book, 307, 308).

V. *Summons in force*.—A writ of summons remains in force, so that it may be served, for four months (Pract. Com. Law, 74; First Book, p. 298).

VI. *Distringas*.—A writ of distringas is issued where the defendant cannot be served with a writ of summons. It is obtained by order of a judge or rule of court on an affidavit of the fruitless attempts to serve the writ of summons, &c. (see Pract. Com. Law, 81—87; First Book, 299—301).

VII. *Defences to action*.—Some of the most usual defences to an action, are payment, set-off, bankruptcy, insolvency, statute of limitations, leave and license, right of way, plene administravit, infancy, coverture, tender before action, &c. These are pleaded—defences by way of demurrer are for matter of law (First Book, 309).

VIII. *Property not liable to execution*.—Fixtures passing with the inheritance (Pract. Com. Law, 307, 308), and pledges in defendant's hands cannot be sold under a fieri facias. Neither can goods in the custody of the law (Pract. Com. Law, 308; see the converse, *ante*, p. 48—50).

IX. *Attesting cognovits, &c.*—Cognovits and warrants of attorney must be attested in the presence of an attorney for the defendant,

who must sign as a witness, &c. (see 6 Law Stud. Mag. 237; Pract. Com. Law, 343, 346).

X. *Reference to masters.*—Bills of costs are referred to the Masters to tax; so principal and interest on bills where judgment goes by default; affidavits where facts are complicated and statements contradictory; oppositions to admission or re-admissions of attorneys; on attachments (except in Queen's Bench) as to contempt (Pract. Com. Law, 443, 444); where attorneys are ordered to answer the matters of affidavits, &c.

XI. *Interlocutory proceedings.*—Interlocutory proceedings are (*inter alia*) proceedings to outlawry, changing venue, obtaining security for costs,oyer of deeds, setting aside proceedings for irregularity, obtaining new trial, arresting judgment, entering suggestions on roll, &c. These are done by the act of the party, but most usually some application to a judge at chambers, or even to the court, is requisite.

XIII. *New county courts.*—A party must sue in the new county courts where the debt is not more than £20, or the damages not more than £5, except the defendant reside more than twenty miles from the plaintiff, or the cause of action did not arise wholly or in some material point within the jurisdiction of the court where defendant dwells, and except (generally) where an officer of the court is a party (see First Book, p. 450, where l. 9, after "debts" add "and damages," and in l. 10 erase "and damages not exceeding £5." In l. 19 of p. 451, after the words "or value thereof," add "and, in cases of tort where the damages exceed £5").

XIV. *County courts—Privilege.*—See 1 Law Stud. Mag., N. S., page 26.

XV. *County courts—Suing in superior courts.*—A debt recoverable in the county court may be sued for in a superior court where the defendant resides more than twenty miles from the plaintiff; where the cause of action does not arise wholly or in some material point (see 1 Law Stud. Mag., N. S., No. 3), within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action being commenced; or where an officer of the court is a party, except in respect of any claim to any goods and chattels taken in execution, or the proceeds or value thereof.

EQUITY.

I. *Injunction against proceeding at law.*—Where a party is sued at law, and has a good defence, but cannot obtain proof except by discovery from plaintiff, he may file a bill for same and obtain an injunction to stay proceedings at law till after answer. So where an executor is sued at law and a decree is made in equity for an administration of the deceased's estate, an injunction may issue to restrain

separate creditors from proceeding at law. So an injunction may be had where it is inequitable that the plaintiff should proceed at law.

II. *Supplying defects in deeds*.—Equity will supply defects in the substance and in the execution of deeds where there has been a mistake, or the omission of a formality arising either from fraud or accident (see Princ. Eq. pp. 15, 23, &c.).

III. *Agreements by infants, &c.*—Contracts of infants if prejudicial to them will not be enforced (Princ. Eq. 51, 186, 187). Nor will the contracts of a married woman, except as to her separate estate (Princ. Eq. 187—189). The executed contracts of a lunatic prior to his being so found by commission, if made during sanity, especially after a lapse of time, and if not unreasonable, will be enforced in equity (see Princ. Eq. 49—51, 184—186).

IV. *Interpleader*.—A bill of interpleader is, where the plaintiff, not having an interest in the subject-matter of litigation, but of which he is possessed, fears he may suffer injury by two or more persons claiming the same thing by different interests. The bill prays that the rival parties may interplead, or contest their doubtful claims, that the court may decide to whom the thing belongs, and that the plaintiff may be indemnified (see further Princ. Equity, p. 225—233). There must be an affidavit annexed to the bill (see Pract. Eq. 104; Princ. Eq. 232, 233).

V. *Perpetuating testimony*.—A bill to perpetuate is filed to preserve testimony that might be lost before the matter to which it applies could be litigated (Princ. Eq. 450; Pract. Eq. 86, 87; 6 Law Stud. Mag. 272—274). The 5 & 6 Vict. c. 69, extends the doctrine to rights, to titles, to dignities, to offices, &c. The evidence cannot be used if the witnesses be able to attend when the litigated matter is tried.

VI. — Every bill in equity may properly be said to be a bill of discovery, but when a bill is filed for the mere purpose of discovering deeds, papers, or any documents whatever, in the power or custody of the defendant, or of any facts resting within his own knowledge, either for the sake of enabling the plaintiff to sue or defend an action at law, or any other purpose of a similar nature, without seeking relief in consequence, it is emphatically styled a bill of discovery, as contradistinguished from all other bills which are exhibited, not merely for the purpose of discovery, but also relief (see further Princ. Equity, 444—449). The costs of such a bill must be paid by the party filing it, after the defendant has put in a satisfactory answer (Ham. Eq. Dig. 469).

VII. *Creditor's suit — Injunction*. — The effect of a decree in a creditor's suit to administer is to entitle the executor to an injunction against proceedings at law (see 2 Law Stud. Mag. 534, 535; 5 *Id.* 511).

VIII. *Subpœna*—*Service*.—The subpœna can only be served (by leave) on the defendant's solicitor, where such defendant is proceeding at law by such solicitor, or without leave where the subpœna is to answer an amended bill. So where substituted service is specially ordered (see Pract. Eq. 110—113).

IX. *Default of appearance*.—If the defendant, being an adult, after having been duly served with the subpœna to appear and answer, does not enter his appearance to the bill within eight days, or within such time as the court shall specially appoint, the plaintiff may proceed to issue an attachment, or may enter an appearance for the defendant. This is under the 16th Order of May, 1845, by art. 3 of which, if a defendant be served with the subpœna to appear to, or to appear to and answer a bill, he is to appear thereto within eight days after the service of such subpœna; if he does not he becomes subject to the following liabilities: 1, An attachment may be issued against him; 2, An appearance may be entered for him on the application of the plaintiff (see Pract. Eq. 120, *et seq.*; First Book, 326).

X. *Copy bill*.—Where the plaintiff prays no account, payment or other direct relief against any of the parties to a bill, the plaintiff need not require such defendants to appear or answer, but may serve them with a copy of the bill, omitting the interrogating part thereof, (see Pract. Eq. 81—85).

XI. *Copy bill—Appearance*.—A party served with a copy of the bill as just mentioned, is entitled to have the suit prosecuted against him in the ordinary way if he desire it, for by the 36th of the orders it is provided that "if the party desires the suit to be prosecuted against himself in the ordinary way, he shall be entitled to have it so prosecuted; and in that case he shall enter an appearance in the common form; and the suit shall then be prosecuted against him in the ordinary way. But the costs occasioned thereby shall be paid by the party so appearing, unless the court shall otherwise direct." (Pract. Equity, 83).

XII. *Amending bill*.—An order of course to amend may be obtained at any time before answer (64th Order of May, 1845). So after answer, if before replication, and within four weeks after answer deemed sufficient (16th Order, May, 1845). So to amend a clerical error at any stage of the cause (65th Order of May, 1845). If a special order to amend is applied for, it must be sworn by the plaintiff or his solicitor: 1, That the draft of the proposed amendments has been settled, approved, and signed by counsel; 2, That such amendment is not intended for the purpose of delay or vexation, but because the same is considered material for the case of the plaintiff (see Order, 67—69 of May, 1845; also Abr. Eq. Cas. p. 2 in 1 Law Stu. Mag. N. S.).

XIII. *Traversing note*.—A traversing note has the same effect as if a defendant had filed a full answer, or further answer, traversing the whole bill, or such parts of the bill as the note relates to, on the day on which the note was filed (1 Dan. Pract. 471).

XIV. *Order—Enforcing*.—The usual mode of now enforcing an order for payment of money is, by writ of *feri facias*, or *elegit*, or by the old process of attachment (Orders of 10 May, 1845; 2 Daniel's Pract. 1020; 6 Law Stud. Mag. 3).

XV. *Master's report*.—If a party is not satisfied with the Master's report, he must in the first place submit the points to the consideration of the Master, by leaving objections to the draft report; after the Master has made his report, if a party is dissatisfied with it, he either files exceptions thereto, or presents a petition for the Master to review his report; or in some few cases the question is raised when the cause is brought before the court on further directions. The mode of proceeding depends upon the nature of the report.

MUTUAL CORRESPONDENCE.

We are sorry to find that our anticipation of a large increase of Correspondents on Moot Points has not been verified. We had hoped that some of our new subscribers would have sent in their names. However, there are still sufficient names to enable the plan to be carried out with advantage to those willing to participate in it.

The following is a corrected list of correspondents on Moot Points :—

Mr. R. Armishaw, of Rugeley, Staffordshire; Mr. C. Ball, King-street, Chester; Mr. J. C. Barlow, jun., Waterloo-street, Birmingham; Mr. A. Barnes, Lichfield; Mr. S. F. Blackmore, at W. P. Blackmore's, Esq., Devonport; Mr. J. Blick, jun., Hill-court, near Droitwich, Worcestershire; Mr. J. E. G. Bradford, of Swindon, Wiltshire; Mr. J. T. Brewster, High Pavement, Nottingham; Mr. H. Caddy, W. E. Price's, Esq., of Great Torrington, Devon; Mr. W. Chubb, 4 Verulam-buildings, Gray's-inn, London; Mr. C. Clements, 2A, Kent-street, Park-lane, Liverpool; Mr. J. Cooke, 15 Devereux-court, Temple, London; Mr. J. Cook, of Witham; Mr. J. L. Cowley, of Week-Day Cross, Nottingham; Mr. A. J. Day, at Messrs. Chapman and Co., Norwich; Mr. T. S. Eddowes, 11 South-crescent, Bed-

ford-square, London; Mr. J. Estlin, jun., of Nuneaton; Mr. F. W. Ferrier, of No. 3 New Millman-street, London; Mr. T. Frankish, at O. Hustler's, Esq., Halstead, Essex; Mr. R. S. Freame, Gillingham, Dorsetshire; Mr. F. W. Freeman, of Wimborne; Mr. H. Glaister, Easingwold, Yorkshire; Mr. T. M. Golding, of Walsham-le-Willows, near Ixworth, Suffolk; Mr. R. Gowan, Palace-street, Berwick-upon-Tweed; Mr. T. Green, Pitt-street, Barnsley; Mr. James Greenhalgh, of Acresfield, Bolton-le-Moors; Mr. J. W. Hall, of No. 11 Essex-street, Strand, London; Mr. T. Hancock, of Blackford, near Wells, Somersetshire; Mr. J. Hartley, at R. Hunt's, Esq., Rochdale; Mr. T. M. Heald, at Messrs. Woodcock and Co.'s, Wigan; Mr. G. B. Haywood, at Messrs. Lamb and Brooks, Basingstoke, Hants; Mr. Samuel Hobbs, jun., Wells, Somersetshire; Mr. T. Horrex, 11 Royal Crescent, Notting-hill, near London; Mr. T. F. Inman, of 7 East Hayes, Bath; Mr. W. B. Iveson, of Holmfirth, near Huddersfield, Yorkshire; Mr. F. T. Keith, of Bracondale, Norwich; Mr. J. Kirke, at Messrs. Mees', East Retford, Notts; Mr. T. L. H. Leaman, of No. 18 Old Cavendish-street, Cavendish-square, London; Mr. F. Miller, 6 Frederick's-place, Old Jewry, London; Mr. W. Newton, jun., The Square, East Retford, Notts; Mr. J. D. Norwood, of Ashford, Kent; Mr. W. S. Page, of Nelson-street, Stroud; Mr. W. Phippard, Wareham; Mr. E. S. Rogers, at J. Dixon's, Esq., Sheffield; Mr. F. Sharpley, at Messrs. Goe's, Louth, Lincolnshire; Mr. J. R. Shore, at Messrs. W. and E. S. Palmer's, solicitors, Paradise-street, Birmingham; Mr. J. Sims, of Harleston, Norfolk; Mr. F. Simms, of Wirksworth, Derbyshire; Mr. Simpson, of Walsham-le-Willows, near Ixworth, Suffolk; Mr. H. Small, of 15 Waterloo-street, Birmingham; Mr. H. Smith, Rugeley, Staffordshire; Mr. R. Sutcliffe, Brownhill, near Burnley, Lancashire; Mr. W. M. Taylor, at Messrs. Mourilyan and Rowsell's, 2 Verulam-buildings, Gray's-inn; Mr. T. Timbrell, of 15 Vineyards, Bath; Mr. J. Tree (Corresponding Secretary to the Law Students' Society), Bransford-road, near Worcester; Mr. T. Varley, of Skipton; Mr. R. Ward, of 43 Noel-street, River-street, Islington, London; Mr. W. H. Warner, solicitor, No. 15 New Calthorpe-street, Gray's-inn-road; Mr. T. Waterhouse, of Northport-street, Ivy-street, Hoxton; Mr. W. Watson, of Hedon, Yorkshire; Mr. C. Wilkinson, Stramongate, Kendal; Mr. A. K. Witt, of No. 10 Portland-terrace, Southampton; Mr. T. H. Waite, of Louth, Lincolnshire.

MOOT POINTS.

No. 14.—*Purchase—Principal and Agent.*

A. purchased land in his own name, but in reality for a railway company. A. was not usually employed for that purpose by the company, nor was he in this instance appointed by instrument under seal, his only authority being a board minute. The purchase not being completed in proper time, the vendor threatens proceedings. Must they be brought against A., or may they be brought against the company?—and what is a sufficient appointment of an agent by an incorporated company to purchase land?

E. M. W. (Colchester).

No. 15.—*Will—Lapse of Gift, &c.*

A., the testator, by will bequeathed (subject to the payment of just debts, &c.) all his goods, chattels, and effects whatsoever and wheresoever (except by his said will thereafter mentioned) unto B., the son of C., the testator's wife, by her former husband, and to his executors, administrators, and assigns for ever. And concerning the moneys which might devolve upon said testator by the will of a deceased relative, he gave the same (together with other personal estates mentioned in the said will), in three distinct shares, to his two brothers and sister, D., E., and F. D. died during the lifetime of said testator. The questions that arise on this case are the following:—

1st. Can testator's personal representatives claim the share bequeathed to D?

2nd. Did such share lapse in the residue, and is B. entitled to such share as residuary legatee?

3rd. Did the testator die intestate as to this one third share?—if such were the case, ought not administration to be taken out?

W. B.

No. 16.—*Transfer of Mortgage—Stamp.*

A. mortgages freehold land to B., by demise, to secure £330 and interest. A. dies, leaving C. his heir at law. B. (mortgagee) transfers the mortgage to D.; and C. (without having any further advance) joins in the transfer, and enters into a *new proviso for payment of mortgage money and interest, and for title*. What stamp duty will the transfer be liable to?

Vide Doe d. Barnes v. Roe, 4 Bing. N. C. 737; Doe d. Bartley v. Gray, 3 Ad. and E. 89; Lant v. Pearce, 8 Ad. and E. 248; Doe d. Snell v. Tom, 4 Q. B. 615; Brown v. Pegg, 6 Q. B. 1; and Humberstone v. Jones, 11 Jurist, 337.

An early answer will oblige.

DUBITATOR.

No. 17.—*Ejectment—Determination of Tenancy.*

A. grants a parol lease for three years, which will expire at Christmas, 1849. A. and B., however, in November, 1848, for considerations, enter into an agreement (signed by them both) that B. shall quit in the succeeding January, 1849. B., however, now refuses to quit; and it is, therefore, inquired if A. has any and what remedy to enforce him to do so. Can an action of ejectment be founded on such agreement, or will any such action be sustainable as upon a determination of the tenancy?

L.

No. 18.—*Husband and Wife—Separate Estate.*

Under a deed of settlement certain sums of money were settled to the separate use of the wife for her life, with the intervention of trustees, remainder to the husband absolutely. The trustees advance to the husband on mortgage during the wife's life, and the husband covenants to pay the interest. No interest, however, is paid to the trustees, nor by them to the wife; and upon his death the wife claims arrears for seven years preceding. The husband and wife lived together, and the property thus settled to her separate use formed her only provision. Can she sustain her claim for the whole or any portion of these arrears?

L.

No. 19.—*Statute of Frauds.*

A. contracts with B. for the purchase of a small plot of land, part of a garden, whereon to build a chapel. The chapel was built, but no conveyance was ever taken from A.; and afterwards B. sells the garden to C.; but in the conveyance no exception was made of the plot on which the chapel was built, the same description being used as in the original grant to A. Can B. maintain his title against A., there having been no deed of conveyance? or would the parcel of ground with the chapel vest in C.?

L.

ANSWERS TO MOOT POINTS.

No. 83.—*Equity of Redemption—Purchaser* (vol. 6, p. 391).

With due deference to your correspondent's authority I beg to submit that the clause in question is objectionable, on the ground that it carries contradiction on the face of it.

Perhaps an inconvenience would be felt in assigning the debt of a trustee in whom the legal estate would vest, and which would for the protection of the purchaser have to be assigned, or the trust thereof declared to keep alive the protection thereby afforded: not a very desirable course to be adopted.

I should, therefore, recommend the searching for incumbrances created subsequent to the mortgage, previously to the execution of the purchase deed; the estate being conveyed "freed and discharged from the said principal sum of £ , and all interest for the same."

W. W. TATTERSALL.

NORX.—We prefer the method by assignment of mortgage debt to a trustee, but think that the form given by the querist might prove effectual.—ENDS.

No. 34.—*Solicitor's Bill—Taxation—I. O. U.* (vol. v., p. 240).

As an I. O. U. is only evidence of an account stated (*Curtis v. Richards*, 1 Man. and Gr. 46), but no evidence of money lent (*Feseymeyer v. Adcock*, 8 Law Times, 393, overruling *Douglas v. Holme*, 12 Ad. and Ellis, 641), it is presumed a solicitor cannot recover the amount of his costs, for work and labour done as an attorney, without first delivering a bill for taxation, pursuant to the 6 & 7 Vict. c. 73, s. 37; as a plea of the non-delivery of a signed bill, pursuant to the statute, in an action of assumpsit, was held a good answer to a count on an account stated (*Brooks v. Beckett*, 8 Law Times, 466; S. C. 11 Jur. 284). Although in *Jeffreys v. Evans* and others (3 Dowl. and Lowndes, 52; S. C. 14 Law Journ., N. S., Ex. 363), it was held, that an attorney who has received a promissory note on account of costs, may bring an action on the note, although he has not delivered a signed bill.

J. D. NORWOOD.

No. 45.—*Copyhold—Presumption of Enfranchisement* (vol. vi., pp. 213, 344, 349, 434).

With respect to the observation of T. F. I. (vol. vi., p. 434), upon my reply to this Moot Point, I would say that he seems to

have entirely misunderstood the nature of a *quosque* seizure : he says, " The lord cannot until admission seize *quosque*, and that there must be an admission of the tenant before any neglect to do so on the part of the lord can have arisen."

Now it is just the reverse, as the following extract from Scriv. Cop. 2nd edit. p. 389, will show : " Although the lord cannot *compel an heir to accept admission*, yet it is not in his power by waiving it to *defeat the lord of his fine* ; for if he does not come in within the period prescribed by the custom of the manor *the lord may seize the land into his own hands until he requires to be admitted* ;" this I think will be sufficient to convince T. F. I. of the incorrectness of his opinion. With respect to the case of *Stewart v. Bridges* (2 Vern. Chan. Ca. 216), I had perused and considered it before sending my reply, and I am of opinion that it is not applicable to the point in question.

C. W. (Witham).

No. 82.—*Landlord and Tenant* (vol. vi., p. 390).

I think the effect of the first agreement is, to create a tenancy from year to year. It cannot create a lease for a longer term, as there is not any certainty as to its beginning, continuing, or ending. Neither is it an estate at will ; because by the express words of the instrument, the tenancy may be determined by *either* party. If the agreement demised the premises for a *certain* number of years, and even expressed that a lease was at a future time to be executed, it would be a lease *in presenti* (see *Harrington v. Wise*, Cro. Eliz. 486 ; *Drake v. Munday*, Cro. Car. 207 ; *Barry v. Nugent*, 5 T. R. 165 ; *Staniforth v. Fox*, 7 Bing. 590).

As to the second agreement this also in my opinion creates a tenancy from year to year, and I think the statement of Lord Chief Justice De Grey in *Roe v. Rees*, 2 Black. 1171, will be found to apply, " that all leases for uncertain terms were, *prima facie*, leases at will ; that the reservation of an annual rent turned them into leases from year to year."

The stamp on a deed has nothing to do with its legal effect and operation ; it only prevents its being pleaded or given in evidence, and its omission or insufficiency is immaterial, as it can be stamped at any time on payment of the penalty.

According to the view I have taken of this " point," I cannot bring the act 8 & 9 Vict. c. 206, s. 3, to apply in any way.

J. A.

NOTE.—The point is, was the first agreement a lease or only an agreement for a lease ? and if the latter, did the second agreement operate to set up a tenancy ? Supposing that the first agreement expressed (as no doubt it did from its language, taken in conjunction with the second agreement), that the tenancy was to commence at a

given day, we think it must be considered as a lease. The case of *Staniforth v. Fox* (7 Bing. 590; S. C. 5 Moo. and Pay. 589), considered with and distinguished from *Dunk v. Hunter* (5 Barn. and Ald. 322), will, we think, be found to justify this conclusion. There appeared on the face of the first instrument all the particulars requisite to create an actual demise.

No. 74.—*Tenancy from Year to Year—Assignment* (vol. vi., p. 342).

"It is an established principle of law that a tenant from year to year may assign his interest unless some agreement subsists between him and his lessor restricting such power," and it is equally clear that B. would be entitled to recover in an action at common law for the damages sustained by the non-performance of the contract, or he might maintain a suit in equity to compel a performance of it, if under the circumstances stated the contract was a legal one and such as might be entered into by parol.

I, however, infer from the point as stated that this is a contract relating to an interest in land, and such a one as the 4th sect. of the statute of frauds requires, to be in writing, and therefore I am of opinion that A. has no remedy upon it, and in support of this opinion I beg to refer to *Mechelen v. Wallace*, 7 Ad. and Ell. 49; *Carrington v. Roots*, 2 M. and W. 248; *Buttermere v. Hayes*, 5 M. and W. 459; and 15 Law Journ., N. S., C. P. 246.

J. H. (Rochdale).

NOTE.—See in addition to the cases above cited, *Falmouth v. Thomas*, 1 Cr. and Mees. 89, and *Vaughan v. Hancock*, 16 Law Journ., C. P. 1; S. C. 10 Jur. 927. We apprehend that the agreement between A. and B. was in effect an assignment to B. of all A.'s interest in the premises, and consequently it could only be good by writing under the statute of frauds, and by deed under sect. 3 of 8 & 9 Vict. c. 106.

No. 94. *Conveyance — Trustees — Purchase money.* — (vol. vi. p. 474).

The trustees of the chapel in question, assuming it to have been settled according to the trusts expressed in the "model deed," have power (with the consent of the Wesleyan Conference, testified in writing under the hand of the president) "absolutely to sell and dispose of the said chapel and premises, or any part thereof, either by public sale or private contract," and to apply the money arising from such sale, 1stly, in discharge of incumbrances, and 2ndly, either for promoting preaching, &c., in the circuit, or for procuring a more convenient chapel and premises to be settled on the like trusts; and it is in and by such "model deed" declared that the receipt of a majority of the trustees shall be a "full discharge" to the purchaser, and that it shall not be incumbent on such purchaser to inquire into the necessity or expediency of such sale, nor to see to the application, or

be answerable for the misapplication of the purchase money (Warren's Digest of Laws and Regulations of Wesleyan Methodists, p. 291). The Conference requires that all applications for consent to any sale of chapels shall be first examined by the Chapel Building Committee, a body appointed annually by Conference, and through such committee be presented to Conference. But in order to provide for cases of indispensable sale in the interval between one Conference and another, the president (on the committee certifying its approval), is empowered "to affix his signature to the document giving permission to sell" (Minutes of Conference, 1848, p. 121).

The special deed may contain a reference to the "model deed," and the trustees in whom the chapel required to be taken by the Railway Company is vested, need not in that case be treated as incapacitated parties, and the purchase money need not be deposited in the Bank of England. On the other hand—assuming no power of sale to be either contained in or referred to by the special deed settling the chapel—the trustees must sell and convey under the authority of the (special) Railway Act, and the Lands' Clauses Consolidation Act, 1845 (8 Vict. c. 18, s. 7). In this case the consent of the Conference would not be requisite, as that, I take it, is only a provision coupled with the trusts of sale alluded to. The purchase money, either agreed upon between the contracting parties (but in that case being not less than shall be determined by two practical surveyors, sec. 9), or as determined by arbitration, or by the verdict of a jury (sec. 23), must be paid into the Bank of England, *ex parte* (sec. 69), to abide the order of the Court of Chancery on petition of the chapel trustees (sec. 70); the costs of the trustees, including the costs of re-investment, being borne by the purchasers (sec. 80). The money so deposited (so far as concerns the case now in question) must be applied, firstly, in the discharge of incumbrances; secondly, in purchase of other premises to be settled upon like trusts (sec. 69): a provision which would meet the equity of the case as completely as could be desired. P. W.

RESULT OF THE EXAMINATIONS.

There were, we are informed, ~~sine~~ clerks rejected at the last Examination; a circumstance which does not much surprise us when we read the questions themselves, especially those in Equity and Common Law.

It is strange that country articulated clerks, who have little or no experience in common law and equity practice, do not endeavour to make up for this disadvantage by a more careful study of those branches of learning. Even if they only extended their reading to our works on the Principles and Practice of Common Law and Equity they might pass, as may be seen by the answers inserted in this number and the references thereto.

HILARY TERM EXAMINATION ANSWERS.

(Continued from p. 41.)

BANKRUPTCY.

I. *Bankruptcy statutes*.—The principal statutes relating to bankruptcy are the 6 Geo. 4, c. 16, passed in 1825, and the 1 & 2 Will. 4, c. 56, in 1831, and the 5 & 6 Vict. c. 122, in 1842.

II. *Who liable to bankrupt laws—Aliens*.—The persons liable to the bankrupt laws are traders, that is, persons buying and selling with a view to getting a livelihood (see First Book, 247; 6 Law Stud. Mag. 246, 247). The bankruptcy laws extend to aliens, denizens, and women (6 Geo. 4, c. 16, s. 135; 6 Law Stud. Mag. 132).

III. *Peers—Executors—Infants—Married Women*.—Peers of the realm and members of Parliament are, if traders, liable to the bankrupt laws (6 Law Stud. Mag. 249). An executor or trustee may be bankrupt when they carry on the business for the benefit of themselves, or devisees, or cestui que trusts (see *Viner v. Cadell*, 3 Espin. 88; exp. Mott, 1 Atk. 102; 1 Bac. Abr. 529, 7th edit.). Infants cannot strictly be made bankrupts, but in cases of deceit they will be left to make out their exemption at law (see *Bolton v. Hodges*, 9 Bing. 365). A married woman when carrying on business as a sole trader in London may be made a bankrupt (2 Black. Com. 477; 2 Law Stud. Mag. 370; 7 Bing. 762).

IV.—*Fiat—Uncertificated bankrupt*.—A second fiat against an uncertificated bankrupt cannot be prosecuted; under circumstances, however, the court has declined to supersede the second fiat (see exp. Lees, 16 Ves. 472; exp. Crew, *Id.* 236; 1 Atk. 242; 8 Bing. 316; 2 Moore, 71).

V. *Demand of payment*—1 & 2 Vict. c. 110, and 5 & 6 Vict. c. 122.—In order to make a trader bankrupt under the 1 & 2 Vict. c. 110, and 5 & 6 Vict. c. 122, he must be summoned by the creditor who has filed an affidavit of his debt. Under the latter act it must be sworn that a copy of the account with a notice requiring payment was duly served. This act does not specify any particular amount of debt, but the 1 & 2 Vict. c. 110, s. 8, requires that a single creditor's debt should be £100; of two separate creditors, £150; of three or more separate creditors, £200 (see 2 Law Stud. Mag. 365, 366).

VI. *Obtaining fiat—Requisites*.—In order to obtain a fiat, the petitioning creditor must swear to a sufficient debt, and present a petition. The requisites to sustain the fiat are a sufficient debt (First Book, 248), a trading, and an act of bankruptcy (First Book, 249; 6 Law Stud. Mag. 360).

SUPP. No. 4.]

VII. *Witnesses*.—Formerly a creditor was held not to be a competent witness to prove the trading or act of bankruptcy, but it should seem that Lord Denman's Act has taken away this disability, and it has even been thought that the bankrupt is a competent witness in an action by his assignees to prove the petitioning creditor's debt, or act of bankruptcy, or any fact which tends to support the commission (Udall v. Walton, 14 Mees. and W. 254; S. C. 14 Law Journ., N. S., Exch. 262; 9 Jur. 515).

VIII. *Petitioning creditor's debt*.—The lowest amount of debt which must be due to a petitioner is £50; to two creditors (not partners), £70 (see First Book, 248).

IX. *Petitioning creditor compounding*.—If after a docket struck a trader should pay or give security for the petitioning creditor's debt, the fiat may be proceeded with or superseded by order of the Lord [Vice] Chancellor (6 Geo. 4, c. 16, s. 8); and the petitioning creditor would forfeit his debt, and be liable to repay the amount or give up the security (see Bushell v. Broad, stated 5 Law Stud. Mag. 26, 27).

X. *Official and creditor's assignees*.—This is fully answered in vol. vi., pp. 250, 361, 362.

XI. *Bill of exchange—Dividends*.—If one of several parties to a bill of exchange become bankrupt, the holder may prove for the whole amount, but can only receive dividends to the amount of 20s. in the whole, and if he have received any part before proof, he must only prove for the residue (see 1 Atk. 107; 10 Ves. 204; 19 Id. 310; 3 Madd. 134).

XII. *Mortgage—Proof—Sale*.—We have so fully described the proceedings in vol. v., p. 293—295, that we must refer the reader to same. See also *ante*, p. 21.

XIII. *Property passing to assignees*.—See vol. vi., pp. 250, 362, 384—386; First Book, 249, 250.

XIV. *Reputed ownership, &c.*—As to the first part of this question, see *ante*, p. 21, No. IX. Property of the bankrupt in the possession of others at the time of the bankruptcy will pass to the assignees, subject, of course, to the rights of such parties.

XV. *Assignment of chose in action—Notice*.—The assignee of a debt or other chose in action should give notice of the assignment to the party who is to pay, so as to prevent the assignees from claiming it as being in the bankrupt's order and disposition (see 6 Law Stud. Mag. 15, 126, 127; Princ. Eq. 303, 308; 5 Jarman and Bythewood's Convey. 261).

CRIMINAL LAW.

I. *Burglary*.—Burglary at common law is the breaking and entering the dwelling-house of another in the night-time to the intent to

commit some felony within the same. The offence is extended by stat. 7 & 8 Geo. 4, c. 29, s. 11, to breaking out of a dwelling-house after an entry therein, with intent to commit a felony, or being therein and committing any felony. Burglary may be said to have been restricted by 1 Vict. c. 86, s. 4, fixing the night to commence at nine in the evening and to conclude at six in the morning. Also by 7 & 8 Geo. 4, c. 29, s. 13, by which out-buildings having no communication are not to be deemed part of a dwelling-house (4 Steph. Com. 172—178; First Book. 393, where the words "in the night-time" are omitted, and 1 Vict. c. 86, s. 4, should be referred to).

II. *False pretences*.—In order to constitute the offence of obtaining money or property by false pretences, the representation must be shown to have been with intent to cheat or defraud the party of the same (see *Rex v. Reed*, 7 Car. and Pay. 348; *Hamilton v. Reg.* 9 Q. B. Rep. 271; *Reg. v. Abbot*, 1 Den. C. C. R. 273; *Reg. v. Leonard*, 2 Car. and Kirw. 514; First Book, 405, 406).

III. *Larceny*.—The taking and fraudulent appropriation of property by one who had lawful possession of it will amount to larceny where the party has the custody only, without any right to the possession. Thus, if a butler, or other servant or clerk having the mere custody of the goods, unlawfully appropriates them, it is larceny (see 1 Hale, 506; *Reg. v. Jackson*, 2 Mood. C. C. 32; *R. v. Eastall*, 2 Russ. C. and M. 197). This supposes that the custody was intrusted by the master, for at the common law it would not be larceny if the servant received the goods for his master's use, and the latter never had possession (*Archb. Crim. Plead.* 166, 6th edit.). This is remedied by 7 & 8 Geo. 4, c. 29, s. 47.

IV. *Embezzlement*.—Embezzlement is where one in a public trust, or as a servant, receives and fraudulently appropriates money or goods for public purposes, or for his master, without the same having been in the possession of the latter (see *Dickinson's Quarter Sessions*, 261, 355, 5th edit.). It must be shown that the party was authorised to receive either the particular money, &c., which he has embezzled, or money generally for his master (*R. v. Thomas Smith, R. and Ryl.* 516; *R. v. Williams*, 6 Car. and P. 626; 1 *Archb. Just. Peace*, 373, 2nd edit.). Also the party's employment must be shown, the receipt of the money or goods, and the fraudulent retention (*Dick. Sess.* 262—265).

V. *Punishment for arson*.—The punishment of arson, no person being in the house, depends on the 7 & 8 Geo. 4, c. 28, s. 8, by which every felony, for which no other punishment is provided, is made punishable with transportation for seven years, or imprisonment for not more than two years; and to such imprisonment may be added, at the discretion of the court, hard labour or solitary confine-

ment, and, in the case of males, whipping. By 7 Will. 4, and 1 Vict. c. 89, s. 2, whoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and shall suffer death (R. v. Paice, 1 Ca. and Kir. 73).

VI. *Perjury—Evidence.*—In prosecutions for perjury there can be no conviction except on the oath of two witnesses; though it will be sufficient that the perjury be directly proved by one witness, and corroborative evidence on some particular point be given by another; and where the alleged perjury consists in the defendant's having contradicted what he himself swore on a former occasion, the testimony of a single witness in support of the defendant's own original statement will support a conviction (Rex v. Mayhew, 6 Car. and P. 315; R. v. Yates, *Ibid.* 132; R. v. Parker, 1 Car. and M. 639; R. v. Harris, 5 B. and Ald. 929).

VII. *Proceedings to trial of indictment.*—The first proceeding against a person accused of an offence in order to bring him to trial is to summon, or in serious cases, to arrest the party to bring him before a justice (1 Law Stud. Mag., N. S., 37, 38); the party is then either discharged, or remanded (*Id.* 39), or committed for trial, in which latter case he is committed to prison or discharged on bail (*Id.* 39, 40). The bailment and depositions are then certified to the proper officer (*Id.* 40). Then, or instead of these proceedings, the prosecutor may prefer his bill before the grand jury. If the bill be found, the party is called on to plead, which he does, and is then tried, or traverses over (in certain cases) to a subsequent session, &c.

VIII. *Justices—Commission.*—Justices of the peace exercise jurisdiction in criminal matters by virtue of the Queen's Special Commission under the great seal (2 Steph. Com. 610, 2nd edit.).

IX. *Sessions.*—This is so fully answered in vol. vi., pp. 366, 367, that we must refer the reader thereto.

X. *Time of holding sessions.*—By the 1 Will. 4, c. 70, s. 35, the Quarter Sessions are appointed to be kept in the first week after the 11th of October, in the first week after the 28th of December, in the first week after the 31st of March, and in the first week after the 24th of June (see as to April Quarter Sessions, 4 & 5 Will. 4, c. 47; as to Middlesex, First Book, 472; as to sessions in cities and boroughs, see 5 & 6 Will. 4, c. 76, s. 105). Petty sessions are held as occasion requires; also special sessions, but in this latter case a previous notice is required (Dick. Sess. 14, 5th edit.).

XI. *Duties of magistrates in sessions.*—See vol. vi., pp. 366, 367.

XII. *Liability of justices.*—See the new act, 1 Law Stud. Mag., N. S., pp. 10, 11.

XIII. *Appeal in criminal cases.*—See 11 & 12 Vict. c. 78, stated in 1 Law Stud. Mag., N. S., pp. 13, 14, 16, 17.

XIV. *Bail in criminal cases.*—See s. 23 of 11 & 12 Vict. c. 42, stated in 1 Law Stud. Mag., N. S., p. 40.

XV. *Costs and expences of prosecution.*—By 7 Geo. 4, the court is empowered in all cases of felony (except where it is otherwise provided, as by 11 & 12 Vict. c. 12, First Book, 355, 437), and upon indictments for certain misdemeanours, to allow, out of the county rate, the expences of the prosecutor and his witnesses, with compensation for their trouble and loss of time; and this whether the case shall terminate in conviction or acquittal, or the throwing out the bill of indictment; and even though no bill of indictment shall have been actually preferred. The misdemeanours included in this provision are as follows:—An assault with intent to commit felony; an attempt to commit a felony; a riot; a misdemeanour for receiving stolen property, knowing the same to have been stolen; an assault upon a peace officer in the execution of his duty, or any person acting in his aid; a neglect or breach of duty as a peace officer; an assault committed in pursuance of a conspiracy to raise the rate of wages; the knowingly obtaining any property by false pretences; the wilful and indecent exposure of the person; and wilful or corrupt perjury, or subornation of perjury.

CONVEYANCING.

I. *Legal and equitable estates.*—If A. by bargain and sale, or appointment under a power, conveys to B. and his heirs to the use of C. and his heirs, B. takes the legal estate and C. only an equitable interest (see Watk. Convey. by White, 256, 257; Co. Litt. 271b, s. 3; Bythewood's Noy's Max. 307, 309).

II. *Residuary devise to tenants in common.*—Where a testator bequeaths the residue of his personal estate to several persons as tenants in common, and two of the residuary legatees die in the lifetime of the testator, their shares will lapse for the benefit of the next of kin (5 Law Stud. Mag. 39, 40; Bagwell v. Dry, 1 P. Will. 700; Page v. Page, 2 P. Will. 483; Lloyd v. Lloyd, 4 Beav. 231; S. C. 5 Jur. 674; Green v. Pertwee, 5 Hare, 249; S. C. 10 Jur. 538). Sect. 25 of 1 Vict. c. 26, does not apply. It is, of course, assumed that the case is not within sect. 33.

III. *Legacy to infant.*—The executor should pay the amount of the legacy into the Bank of England, with the privity of the Accountant-General, to be placed to the account of the legatee, which payment will, by the 36 Geo. 3, c. 52, be a sufficient discharge for such legacy. The executor is not bound to pay the legacy into the bank till the expiration of a year from the testator's death (see Toller's Executor, 317, 318, 7th edit.; see also 11 & 12 Vict. c. 96, mentioned in 5 Law Stud. Mag. 138).

IV. *Judgments—Power.*—A person having a sole absolute power

of appointment over real estate cannot defeat judgments entered up against him subsequently to the vesting of such power in him, if the purchaser have notice of them; but such as he has not notice of, he may defeat (see 1 & 2 Vict., c. 110, s. 13; 2 & 3 Vict. c. 11, s. 5, as explained *ante*, p. 26).

V. *Purchaser without notice of settlement*.—If the owner of an estate convey it for the benefit of his family, and then sell it, the purchaser for consideration will be entitled to the estate, and this even though he had notice of the settlement, supposing the latter to have been voluntary (see 6 Law Stud. Mag. 113, *et seq.*, where the subject is fully considered).

VI. *Conveyance—Execution by attorney*.—A purchaser is not bound to take a conveyance executed by the attorney of the vendor under a power of attorney (Sugd. Vend. 693, 11th edit.). If, however, the purchaser take such an execution, the attorney should execute a declaration of trust to provide against the effect of the vendor's death (*Ibid*).

VII. *Custody of title deeds*.—A tenant for life of the legal estate is entitled to the custody of the title deeds, though the remainderman may in some cases have them brought into court (see 6 Law Stud. Mag. 86, 87; Princ. Eq. 180, 181).

VIII. *Defeasance*.—A defeasance is as to freeholds a collateral deed made at the same time with the conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone (2 Black. Com. 327; 2 Shepp. Touch. 396). Defeasances as to chattels and executory interests may be made at any time (2 Shepp. Touch. 397). Defeasances of this latter kind are resorted to in order to obviate the consequences of giving a licence to assign (see Shepp. Touch. 396, 398; Watk. Convey. by White, pp. 39, 330).

IX. *Tithes—Modus*.—Corn and hay, universally, and wood, except so far as local usages prevail to the contrary, are accounted *great* tithes. All other predial tithes, exclusively of those above specified, and comprehending seeds, even of articles which, ripened to maturity, would be great tithes, as well as mixed and personal tithes in general, are ranked in the class of *small* tithes (see Toller's Tithes, 49, 3rd edit.; 3 Steph. Com. 78, 2nd edit.; Com. Dig. tit. "Dismes," G. 1). A *modus* is a composition for tithes, which has existed from time immemorial; or, in other words, where by custom or prescription, a particular mode of tithing has subsisted different from that authorised by the general law (see Toller's Tithes, chap. 8; 3 Steph. Com. 80, 2nd edit.). A tithe rent-charge is a payment in lieu of tithes, on the land being discharged from same under the Tithe Commutation Acts (see 6 & 7 Will. 4, c. 71; see s. 90, as to rent-charges in lieu of tithes under any custom or private act).

X. *Stamping instruments after execution.*—Deeds may be stamped at any time before they are produced in evidence on payment of a penalty of £5; and agreements of less than 1,080 words may be stamped within fourteen days without payment of penalty, and after that time on paying £10, and so may agreements of more than 1,080 words within twenty-one days, or after that time on payment of £5. Receipts may be stamped within fourteen days on payment of duty and £10 (Addison's Cont. 140, 141).

XI. *Conversion of realty and personality.*—Real estate is considered as personal where the party has contracted to sell same, or has devised same to be sold absolutely; personal estate is considered as realty where a person has contracted to purchase land, or has directed money to be laid out in purchasing land (2 Story's Eq. Jurisprud. s. 790; Princ. Eq. 220—222).

XII. *Altering deed.*—We refer to 1 Law Stud. Mag. N. S., 75, for part answer. If the alteration be by all the parties, and be in a material point, the deed must be re-executed and re-stamped (see 9 East, 354, note; 4 Bing. 123; Keele v. Wheeler, 13 Law Journ., N. S., C. P. 170; French v. Patton, 9 East, 351; Addison's Cont. 13, 139, 140).

XIII. *Lease for life by termor.*—A lessee for 999 years cannot strictly grant a lease for life, as his own interest is less in the eye of the law than an estate for life.

XIV. *Mortgage—Timber.*—A mortgagee in possession after default cannot rightfully cut down timber, unless where the security is insufficient (see for general reasons, Princ. Eq. 297, 298, and more particularly, Sel. Cas. Chanc. 131; Humphries v. Harrison, 1 Jac. and W. 381; Robinson v. Letton, 3 Atk. 210).

XV. *Relief against ejectment.*—If a lessor brings ejectment for non-payment of rent, there not having been a sufficient distress on the premises, the lessee cannot at law have relief (except by writ of error) after judgment and execution, but he may in equity, provided that he file a bill within six calendar months after execution executed. But even if the lessee file a bill within such time, he cannot have or continue an injunction against the proceedings at law, unless within forty days after a perfect answer he bring into court the rent and costs (4 Geo. 2, c. 28 ss. 2, 3; Selw. N. P. 733, 11th edit.; 7 Bacon's Abr. tit. "Rent," I.; Princ. Com. Law, 19; Princ. Eq. 387, 389; First Book, 289).

CORRESPONDENCE.

Debt for Instalments.

GENTLEMEN,—In page 60 of "Principles of the Common Law" you will find it stated that "Assumpsit is the only proper form of action to recover an instalment of a sum payable by instalments on a simple contract agreement, the whole not being due, as debt will not lie until the last day of payment be past, *or unless there be a provision in the agreement making the whole sum due and payable on default of payment of any one instalment;*" and in support of this is cited 2 Will. Saund. 303, note C (in mistake, I think, for 3 Will. Saund. 303, and note G): having referred to that authority, I am unable to find any confirmation of the proposition, that if the agreement makes the "whole sum due and payable on default in payment of any one instalment," debt will lie; I think all that is stated in the note referred to, is that "debt will not lie on a promissory note payable by instalments until all are due," and *Rudder v. Price*, 1 H. Blackst., 547, is there cited.

I believe it was only decided in *Rudder v. Price*, that "debt will not lie on a promissory note payable by instalments, till the last day of payment be past."

As the question may be of importance to others, as it is undoubtedly to me, you perhaps will be good enough to explain whether debt will lie (after default made) on a promissory note payable by instalments, and in which a provision is contained, that "on default being made in payment of any one of such instalments the whole of the sum remaining unpaid at the time of such default shall become payable on demand."

From the reasoning in the cases, I think debt will lie; but as I have not been able to find in any case the affirmative expressly decided, it would perhaps be of use, did you in your next number of the MAGAZINE give the point your consideration.—Yours, &c.,

F. W. M.

NOTE.—As our correspondent has evidently taken some pains, and the subject upon which he writes is one of great importance, we give insertion to his communication, though we have no doubt as to the correctness of the original statement. The distinction is this: If one debt be payable by instalments, an action of debt will not lie until the last day of payment is past, or until the whole sum is payable; but if there be two or more distinct debts, then debt will lie for any one on its becoming due (See Comyn's Dig tit. "Action"

F.; Bacon's Abr. tit. "Debt" B.; Coates v. Hewitt, 1 Wilson, 81). This subject is well explained in Browne's Treat. on Actions at Law (p. 351), where it is said: "Debt will not lie on a note payable by instalments, nor for a debt payable in that manner, until all the instalments are due, unless there be a penalty which becomes due in default of any payment, or *the whole in such case becomes due*, in which case debt will lie for the penalty on any such default. Where, however, the sum payable is not an instalment of a larger sum, but a distinct debt, debt lies. Thus it lies to recover two sums payable on different days."

MOOT POINTS.

No. 20.—*American Certificate—Whether a Bar to English Debts.*

An Englishman by birth, but for some years past a resident in America, carried on a trade between Liverpool and New York, and thereby contracted debts in England.

He subsequently became a bankrupt according to the law in America, and obtained his certificate.

Is that certificate a bar to English debts? or would he be liable on coming to England to be sued for the same?

CHARLES CLEMENTS.

No. 21.—*Dower—Conveyance.*

A. B. being seised of certain freehold estates devised the same to C. D. C. D. afterwards mortgaged the same estates to E. F., and his wife was a party to the deed and duly acknowledged the same. C. D. has paid off the mortgage, and taken a reconveyance of the estates *to uses to bar dower*. C. D. has now sold the estates by auction. Is his wife a necessary party to the several conveyances to the purchasers, or was her dower barred by the reconveyance?

H. GLAISTER (Easingwold).

No. 22.—*Dower—Conveyance.*

A. B. being entitled to the equity of redemption in certain freehold estates died intestate, which descended to his heir at law C. D. C. D. paid off the mortgage, and took a reconveyance to uses to bar dower, and has since sold the estates. C. D. was married prior to 1834. Is his wife a necessary party to the conveyance to the purchaser?

H. GLAISTER (Easingwold).

NOTE.—Mr. Glaister would be happy to correspond with any of our subscribers on the above points.

No. 23.—*Intestacy.*

If A., having had four children, dies intestate, leaving a son and daughter living, his two other children (daughters) having died in his lifetime, each leaving children and a husband, are the issue or the husbands of such deceased daughters entitled to take, under the statute of distribution, such deceased daughters' shares? I. T.

No. 24.—*Replevin.*

The plaintiff (who is the official assignee under a fiat in bankruptcy issued on the *day after* a distress for rent is made) replevies the goods within the five days allowed by law to keep possession. Can the landlord (without notice of an act of bankruptcy committed by his tenant) recover the whole amount of his levy for several years' rent in arrears, or only a year's rent? And in whose name ought the replevin to be brought, the property of the goods being in the bankrupt at the time of the taking? I. T.

No. 25.—*Leaseholds—Assignment from Mortgagor and Mortgagee.*

If the executors of a mortgagee join with the mortgagor in the assignment to a purchaser, and assign all deeds, &c., in any way relating to the title to the property in question in the custody, possession, or power of the mortgagor and mortgagee's executors respectively, which the mortgagor can procure without suit at law or in equity, is the purchaser entitled to the probate of the will of the executor's testator? and if so, what is the best remedy to enforce such right, the purchaser, upon the execution of the assignment and settlement of the purchase, having insisted upon his right to the same? I. T.

No. 26.—*Lease.*

Please to peruse the third section of the 8 & 9 Vict. c. 106. Can a term of years for three years or more, be legally granted of real estate, except by a deed stamped according to the rent reserved. There has been a *nisi prius* decision at the sittings in London or Middlesex on this point during, I think, last year.

P. W. W.

No. 27.—*Settlement—Construction.*

In the year 1846, A. being possessed of a sum of money and some plate, household furniture and other personal property, contracted a marriage with B.

Previous to the solemnisation of the marriage a deed of settlement was executed, by which it was intended that the money and personal effects should be settled upon the trusts mentioned in the deed so as to give A. absolute controul over them. The deed contained a recital

to that effect, but through an inadvertence the operative part related only to the settlement of the money, and contained no mention or description of the household goods and furniture, &c. The trusts of the deed gave full power to A. to have the *use, wear, and enjoyment* during her life of all the plate, household furniture, &c., *free from and absolutely independent of the controul, disposition, or inter-meddling of her intended husband*, and to the trustees after her decease, or during her life with her consent in writing, to sell and dispose of the said household furniture, &c., and convert same into money, &c.

The *habendum* carries the words *monies* and other the *premises* hereby assigned, or *intended so to be*. All parties were present when the deed was executed, but no formal *delivery of the furniture was given* to the trustees. Unhappy differences having arisen, A. and B. have ceased to reside together, and the latter has taken possession of the household furniture and effects, and is preparing to sell them.

Under the deed of settlement and the trusts therein contained is the furniture, &c., vested in the trustees? and can they now dispose of the same on receiving an authority in writing from A. requiring them to do so?

J. E. G. B.

No. 28.—*Lien*.

R., an attorney, deceased, advanced Y. £10, for which title deeds were deposited as a security for repayment. Y. has lately been sued in the county court for the £10 principal, £5 interest, and £5 costs. The whole of £20, however, being barred by the statute of limitations, and so pleaded by defendant, the action against him was *withdrawn*. Y. now wishes to have his title deeds. Will trover lie for them? does the lien extend to the possession by R.'s executors? and does the equitable right remain, although the legal remedy be gone. The annual value of the property comprised in the title deeds deposited is under £10 per annum, or £200 in gross. (See *re Bromhead*, 16 Law Journ. 355, Q. B., and *Waller v. Lacy*, 1 Man. and Gr., 54; Archbold's Common Law Prac. 1847, 1st vol.) These two cases seem to militate *in toto* against each other. I shall feel obliged if any gentleman will address me on this point.

F. W. FREEMAN, (Wimborne, Minster).

No. 29.—*Negligence*.

A. is the owner of a reservoir of water, against the bank of which B. has erected a house on his own land; C. has hollowed part of the bank for a shed, thereby weakening the bank, which, in the course of a few months, gives way in that place. The water rushes out, and washes down two houses belonging to C. Against whom has C. any remedy, and what?

VOLENS.

No. 30.—*Fine—Estoppel, &c.*

Tenant for life of freehold estates, with remainder to his five children, as tenants in common in fee. The tenant for life, and four of the tenants in common (the fifth having died intestate and without issue), are made parties to a deed by which, after reciting that they had voluntarily, mutually, and reciprocally consented, and agreed to limit and assure the hereditaments in the several and respective undermentioned parts, shares, and proportions to the several and respective uses, &c., thereafter limited and declared, they covenanted to levy a fine, which, it was declared, should enure as to the entirety to the use of the tenant for life for his life with remainder as to one equal fourth part, to the use of the elder of the four (Alexander) in fee, as to the other fourth part to the use of the second (Benjamin) in fee, as to one other fourth part to the use of the third in fee, and as to the remaining fourth part to the use of the fourth in fee. A fine was levied, which Alexander acknowledged, but he did not execute the deed declaring the uses of it. Alexander afterwards died without issue, leaving Benjamin his heir-at-law.

Under the above circumstances, and having regard to the doctrine of estoppel, is Benjamin entitled to two-fourths or three-fifths.

No. 31.—*Insolvent—Fresh Promise.*

If A. obtains his final order under the 5 & 6 Victoria, and subsequently makes a promise in writing to pay a debt inserted in his schedule, could the creditor recover under this promise?

Mr. H. would be glad to receive communications on this point.

HENRY HUGHES (High-street, Maidstone).

ANSWERS TO MOOT POINTS.

No. 97.—*Agreement—Stamp* (vol. vi., p. 500).

Assuming this instrument was executed before the 1st January, 1845, I am of opinion it must be construed as a lease. In the case of *Doe d. Walker v. Groves*, 15 East, 243, a document whereby A. agreed to let, and also upon demand to execute unto B. a lease of a farm, and B. thereby agreed to take and upon demand to execute a counterpart of a lease of these premises, was held to be a present demise, and therefore requiring a lease stamp. *Per curiam* "If by the terms of this agreement it had been provided that there should be no entry until a lease was executed, I (Ellenborough, C. J.) should have had considerable doubt. But as the case stands, it does appear

to me that the instrument must be considered as a present lease. Here the parties have used words of present demise, and it was clearly their intention that the tenant should enter, and if neither party should require a lease, go on under this contract of demise for the period mentioned therein." It will be perceived this is more than a case in point, for there the parties agreed to execute a lease if either party should require one (see also *Poole v. Bentley*, 12 East, 168; *Doe d. Jackson v. Ashburner*, 5 T. R. 163; *Barry v. Nugent*, *Ibid.* 165; *Tarte v. Darby*, 15 Law Journ., N. S., Exch. 326). But if executed during the period sect. 4 of the 7 & 8 Vict. c. 76, remained in force, it would then, according to the case of *Burton v. Revell* (11 Jur. 71; S. C. 8 Law Times, 367), take effect as a mere agreement to execute a lease, and will not require to be stamped. But it is presumed that if this agreement was executed *after* the 7 & 8 Vict. c. 76, became inoperative, it will then come within the 3rd section of the 8 & 9 Vict. c. 106, which enacts that where a lease is by law required to be in writing, made after the 1st day of October, 1845, it will be *void* at law unless made by deed, and as it is to continue for four years unless determined as therein mentioned, it will require to be made by deed (see 29 Car. 2, c. 3, s. 2).

J. D. NORWOOD.

No. 4.—*Trustees—Receipts* (No. 2, N. S., p. 27).

In this case I am of opinion that a valid conveyance is made to the purchaser, and that the receipt is sufficient. The conveyance, of course, contains a receipt clause, and discharges the purchaser from all liability in respect of the application of the purchase-money. Now I think that the trustees, acknowledging the receipt of the purchase-money, allow that the receipt given for it is sufficient, and we may assume that the money was paid to the two trustees who signed the deed by the direction of the other two. Again, money in point of fact can only be received by one person. I consider that the trustees have properly conveyed the legal estate vested in them jointly, as the deed is executed by all, so I think that the purchaser has a valid conveyance, and that a court of judicature would pronounce his title to be good.

I can find no authority on this subject.

H. S. H. (Salisbury).

No. 16.—*Lease under Power* (vol. vi., p. 118).

The clause of warranty by the tenant for life amounts to an *express* covenant for quiet enjoyment during the whole of the terms, and as the lessee has been evicted he can bring an action against the personal representatives of the tenant for life, for damages for breach of

the covenant (see the case of *Williams v. Burrell*, 1 Com. Bench. Rep. 402, which is exactly in point).

G. B. HAYWOOD (Basingstoke).

No. 96.—*Conveyance—Stamp* (vol. vi., p. 500).

The only doubt which I have upon the validity of this apportionment is whether the exemption in the Stamp Act from the duty on conveyances upon sale of lands would be held to apply to the present case. It will be observed that the exemption is made in favour of surrenders and other instruments relating *only* to copyhold or customary estates whose clear yearly value does not exceed twenty shillings, but which are thereafter otherwise charged, under the title of copyhold, with a duty of five shillings (see 55 Geo. 3, c. 184, tit. "Conveyance and Copyhold Estates"). Now might not the question be raised, does the surrender of the copyhold land in the manor of B. *relate only* to that piece of land, and might it not be contended that the surrender *bears some relation to the estate in general*, which relation, it might be urged, *is shown* by the apportionment made? I mention this doubt for the consideration of some of your more intelligent correspondents, and if it could be shown that such relation (if any) does not take the case out of the exemption in the Stamp Act, then I think we may fairly consider the apportionment valid; in support of which I would beg to refer you to Sugden's *Vend. and Pur.* (vol. 2, p. 445, 10th edit.), where it is stated that, "where a purchaser is authorised to distribute the purchase money between the several conveyances of a property which requires different modes of conveyance, it has always been considered that the purchase money may (if it can) be so apportioned as to lessen the amount of duty which would have been payable on the aggregate sum, and the words of the statute appear expressly to authorise this view."

J. BRAUMONT (Witham).

No. 4.—*Trustees—Receipts* (No. 2, N. S., p. 27).

As the trust is a joint office the receipt must be signed by *all* the trustees who have undertaken to act; and where a power is given to trustees to discharge the purchaser from seeing to the application of his purchase money, the receipt must be signed even by a trustee who has parted with the estate by a conveyance to his co-trustees; for the transfer of the estate at law carries not along with it the confidence in equity (*Lewin on Trusts*, p. 349; *Crewe v. Dicken*, 4 Ves. jun. 97).

Unquestionably, if the words of the power of sale were strictly followed out the conveyance would be a valid one at law, but a prudent purchaser would, I should say, be very unwilling to accept such a conveyance, entailing, as it does, the responsibility of seeing to the application of the purchase money.

F. T. K. (Norwich).

Copyhold Enfranchisements (vol. vi., pp. 345, 434, and vol. vii., p. 45).

Mr. C. W. has mistaken what I meant in saying that the lord could not seize *quousque*, as looking at my answer it will be seen that I meant seize *quousque* payment of the fine, and this (as may be seen from the introductory remarks to his answer, p. 345, vol. vi.) will be found to be correct. As to the case of *Bridges v. Mason*, I still think the case to be in point. Scriven (*Copyholds*, vol. i., p. 561, note, 2nd edit.) makes the following statement, which he grounds solely on this decision:—"Grant of the freehold presumed after twenty years." It is clear from this that he thinks it applicable in a case like the present.

T. F. I.

NOTE.—Our correspondent (Mr. T. F. Inman of Bath) would be glad to have C. W.'s name and address with a view to correspondence with him on the above point. Will C. W. forward same to Mr. I?

No. 17.—*Covenant not to Build* (vol. vi., p. 118).

In endeavouring to answer this question, I presume the first thing is, to enquire, whether the word "assigns" is mentioned in the covenant. For a collateral covenant to be done upon the land, as to build *de novo*, shall not bind the assignee unless named in the covenant.

Assuming the word "assigns" to be omitted in the covenant, I cannot think that notice given to C. after a conveyance to him from A. will make C. liable. Nor do I think such a covenant can be construed an incumbrance, and affected by the words "free from incumbrance."

Now as to B. I take it he is not exempted from liability under his covenant, and the benefit issuing under it will devolve upon C.

As to the last question. As it appears that no covenant of the above nature was specified in the contract for sale, had C. refused to perform his contract, no court would compel C. to do that which he had not contracted to do.

T. S. E.

NOTE.—As to the point of notice and its effects, upon which the whole case hinges, it seems to us that as the covenant not to build, &c., was contained in the original conveyance, C. must be taken to have notice of it *before the* completion of his purchase, and in that case he would be bound by the covenant, even though it do not run with the land (see *Tulk v. Moxhay*, 13 Jur. 26, 89; fully stated *Abr. Eq. Cas.* in 1 *Law Stud. Mag.*, N. S., 10, 11; in 4th line from top of page 11, for "equitable," read "inequitable.")

No. 27.—*Devise—Failure of Issue—Remoteness* (vol. vi., p. 122).

I apprehend the devise to C. is not void for remoteness, but that B. takes a life estate, with remainder to his children as tenants in common in fee, with an executory devise over to C. in fee.

Now had not the word "leaving" been introduced into the will, I apprehend it might perhaps be successfully contended that the estate limited to C. is void for remoteness, but I have a doubt as to this, because C. appears to be a person *in esse* at the time of the devise.

T. S. E.

HILARY TERM EXAMINATION ANSWERS.

COMMON LAW.

The following answer was by some accident omitted in our last number of the SUPPLEMENT:—

XII. *Repairs*.—It is by no means easy to state what repairs a tenant, who holds for three years under a parol letting, without any mention of repairs, would be liable for. The text-books afford no satisfactory information, and the question depends, in part, at least, upon the point, whether or not such a lessee is liable for permissive waste. Now it so happens that this point, though mooted in the case of *Harnett v. Maitland*, 16 Mees. and W. 257; S. C. 4 Dowl. and L. 545; 16 Law Journ., N. S., Exch. 134, was not decided, and till it is it will be impossible to answer the question so far as regards acts of permissive waste. It is laid down in the last edition of Woodfall's *Landlord and Tenant* (pp. 434, 435), that "where no agreement or stipulation respecting repairs has been entered into, the tenant or lessee is always liable. The landlord is, in such cases, never liable to repair, *i. e.*, he is not subject to an action for the non-repair." We consider that this is correct if it is to be held that such a tenant is liable for permissive waste, as we incline to think he will be so held. The case of *Standen v. Christmas* (16 Law Journ., N. S., Q. B. 265; S. C. 11 Jur. 694), leads to the conclusion that such a tenant is so liable. Thus Lord Denman said in effect that no implied contract to repair, arising out of the relation of landlord and tenant, can arise where the tenant holds under an express contract which provides for the very matter. It should seem that if there had been no express contract, the decision would have been different. As to that part of the question which relates to commissive or voluntary waste, there is no doubt that such a tenant would be liable; as for removing partition-walls, stopping-up windows, making new door-ways, &c.

LETTER TO AN ARTICLED CLERK.

[We are sorry that our want of space has hitherto prevented the insertion of the following admirable letter to an articulated clerk, which well deserves a careful perusal from our subscribers, and will, we trust, not fail to make a permanent impression on some at least.]

GENTLEMEN,—As bearing out the many excellent hints on study which have from time to time appeared in the pages of your MAGAZINE, I send you for insertion therein the following letter, written by a very eminent man (since deceased) to an articulated clerk upon his entering upon the duties of the office. As it contains so much practical good advice, and as it may prove acceptable to the great body of articulated clerks, I trust that you will not hesitate to give it a place in the pages of your excellent MAGAZINE.

I beg to remain, &c.,

St. Albans, August 28, 1848.

FREDERICK STORY.

MY DEAR F——, —Understanding that you are now placed in the office of your father, and that your future and permanent course of life is thus settled, and wisely and judiciously settled, I trust, I am anxious from a sincere interest in your welfare to communicate some hints to you by way of admonition, while the season of admonition is yet at hand, as to the application of your time, and if they should prove acceptable and any way useful to you, it will give me more than common satisfaction.

You will observe that I am anxious to convey these hints to you "while the season of admonition is yet at hand," for you are now undoubtedly entering upon a most important era of your life, probably the most important. From the early dispositions you may cherish, from the manner in which your time may be spent even in the course of the very year which has just commenced, your mind may receive a decisive direction, its powers may be either limited or enlarged, its estimate made of the value of moral character and conduct, and hence may be formed the very model of that future life in which your happiness will be so materially involved.

The importance of the subject cannot then be doubted, and however I may doubt my own sufficiency to deal with it as its importance deserves, I should not satisfy my own mind, if, from those doubts, I should refrain from offering you those hints which, according to my best judgment, may be useful to you on the present all-important question as to the application of your time.

The period you have just passed, has been a period of scholastic discipline and regulation; the period you are now entering upon

SUPP. No. 5.]

must also be a period of discipline and regulation, not of the school, but of your own firmness and decision. You must lay down certain rules for your own guidance, and you must be firm in the observance of them, for however wise the rules, no good can come, but from a strict observance of them. No one ever became great and distinguished from the mere acquirements of the school. He must himself, after he becomes in some degree under his own control, when a man's best preceptor is his own willing mind, work upon the foundations of the school; he must instruct and inform himself by diligent reading, and reflection upon what he reads; it is, indeed, by this application that the most solid advantages are to be reaped.

The first principle, then, that I wish to inculcate upon your mind is, to endeavour to elevate yourself above the pleasurable pursuits of time, and to exercise yourself in a regular systematic pursuit of knowledge and information. This is a principle which must be ever present with you. The mode in which it may be best carried into effect may admit of different opinions, and whatever you may determine upon may admit also of alterations in practice according to your own judgment, when the advantages of the principle are opening and unfolding to your mind. My opinion of that mode I will proceed to give you. I would recommend you, then, to become a subscriber to a circulating book society of the town where the daily papers are to be read, and to make a point, with your father's leave, of spending an hour there every morning after breakfast, and be careful not to exceed the hour. There read the daily papers, particularly "the Times," confessedly the most distinguished in talent—read the debates in Parliament especially, and reports of other public meetings, law proceedings, and matters of that public character. This practice will familiarise your mind in a right train of thinking, and will become a matter of interest to you, by exciting a desire to be acquainted with the passing events of public life, and elevating you above the limited localities of a country town. By an attentive perusal also of the speeches of the most eminent men of the day, you may acquire a taste for elegance of composition, and elegance of expression.

You may also meet with literary men, and their conversation may give a stimulus to your own exertions, and help to water and ripen the seeds of improvement, which are to take their root in the principle you have laid down for your guidance. After this little discipline at the commencement of the day, you will enter upon the business of the office with cheerfulness, and with a determination to discharge your duties there with diligence and attention; those duties will close at a certain hour, leaving you, I apprehend, a considerable portion of time to be disposed of, as may be deemed best calculated to promote this said principle, which is to be ever present

to your mind. I do not mean to recommend a total abstinence from society, or those evening parties in which your family may occasionally mix, but I do mean to inculcate this conviction on your mind, that you are not to permit that mode of applying your time to have a prevailing influence with you, and that if you should find the desire of this sort of engagement to be increasing and attractive, you are to withdraw yourself a little from it, enter into it more sparingly, and recur to the maxim laid down in the former part of this letter, namely, "that the present is a period of discipline and regulation, imposed upon you by your own judgment, and that it is your duty to act upon it with firmness and decision."

Well, then, how is the time after the close of business to be disposed of?—I answer, in reading and study. If you should find a reluctance at the outset of this discipline, determine to conquer it, and a little time in the practice will reconcile you to it, will create a desire to pursue it, and in the end a paramount desire. You will find this to be true, I venture to assure you. Do you ask what you shall read: I will offer you a recommendation in that respect too, subject always to your father's better judgment and approval, to which the whole of this letter is to be subject. Read, then, a work of Mr. Hallam, entitled Hallam's Constitutional History of England, from the accession of Henry VII. to the death of George II. It includes almost the whole interesting part of English history, especially the two important periods of the Reformation and the Revolution, an intimate acquaintance with which is alike essential to the gentleman and the lawyer. It is a work of infinite ability and extensive research. Do not read too much at a time, but put the book down, and carry your mind over that which you have read, and think upon it. This will assist your memory, and cause an impression to be made there, without which reading will be of little service. Read also the notes, and when you come to a Latin or Greek reference (there are very few in Greek, if any), take care to be master of the translation. Before you get through the first volume, I confidently expect you will be sensible of the advantage of that application of your time which I recommend, and you will begin to feel that a matter of pleasure which before was matter of discipline and regulation. You must not, however, neglect your old friends, Horace and Virgil; if you do, they will neglect you, which you will have occasion to regret deeply.

Before, however, I conclude, I cannot refrain from guarding you against a too prevailing practice in the world, of making the Sabbath more a day of pleasure than a day of worship and adoration of the great Author of our being, and of all the bounties of His providence. I do not mean to preach a sermon to you on this fatal error, but I will give you the words of an eminently pious divine, Mr. Leigh

Richmond, whose interesting life has been published. In a letter of advice from him to his sister, he says "Be scrupulously attentive to the observance of the Sabbath, both in public and in private, both at church and at home; and in all your pleasures, all your pains, all your employments, prospects, plans and engagements, remember, that the use of this life is to prepare for a better." What can I do better than to close this letter, written under a warm interest in your welfare, with the impressive advice of that great divine and excellent man: remember, "that the use of this life is to prepare for a better." May it be ever on your mind. *Vale et valete, tu observantissimus.*

CORRESPONDENCE.

The Examinations.

GENTLEMEN,—Being one of those who will shortly undergo the law examination, I am naturally anxious to know how the same is conducted; and I am sure that such anxiety will be a sufficient apology for my troubling you to answer me the following questions:—

1st. What style of answers do the examiners require? and if such answers are correct, is brevity an objection to them?

2nd. Will questions which admit of an answer in the affirmative or negative be considered as sufficiently answered by *yes* or *no*? or is it necessary to embody the question in the answer? or will an answer which is merely connected with a question by reference to the number of such question be sufficient?

3rd. How are the examiners guided in passing or rejecting a candidate, and will wrong answers to questions which are dubious in their meaning be thrown into the scale against a candidate?

4th. Supposing a candidate not to answer the requisite number of questions in common law and equity, would he be rejected, notwithstanding he might show a competent knowledge of all or a majority of the other branches?

As I am a constant reader of your *MAGAZINE*, I hope you will favour me with answers to the above in your next number.

I remain, &c.,

A STUDENT.

NOTE.—As the above matters are of general interest, we have thought it advisable to give insertion to the communication of our correspondent, and will now proceed to answer the questions.

1st. The examiners do *not* require long wordy answers, but require a brief reply to each question, showing an acquaintance with the subject of the question.

2nd. The examiners will not, as a general rule, be satisfied with a "yes" or a "no," but require a short statement of the *reasons* for the reply.

3rd. We understand that a wrong answer, if it display any acquaintance with the subject, will not be considered unfavourably. But, of course, it will depend upon the number of the correct answers besides. If all the branches are attempted, a majority of correct answers would suffice, but if the candidate confine himself to the two indispensable branches (common law and equity) and one other chosen by the candidate, he will be required to answer about three-fourths, of which, however, not all will be required to be correct, if a good acquaintance with the subjects be displayed.

4th. A candidate not answering the requisite number of questions in common law and equity would be rejected, though he might show a competent knowledge of all or a majority of the other branches. In a doubtful case of this sort, the answers in the other branches would weigh in the candidate's favour, especially if, from circumstances, he had been unable to pay much attention to common law and equity, and so stated in his examination papers.

Descent—Half blood.

[We insert the following communication without any comment, in order to afford some of our subscribers an opportunity of explaining the matter.]

GENTLEMEN,—Upon reading your edition of "Littleton's Tenures," sections 6 and 7, and notes, with reference to inheritances by the half-blood, I am led to make an observation upon the apparent effect of the 9th section of the 3 & 4 Will. 4, c. 106, quoted in your note to the 6th section of Littleton.

Giving the effect of the 7th section of Littleton in your heading to it, you state that "The sister of the whole blood was preferred to the brother of the half-blood of the purchaser;" and, in your note, that "The law is still the same, only in Littleton's time the half-brother could never have taken, whereas by the 3 & 4 Will. 4, c. 106, s. 9, he is merely postponed to the sister and her issue." This refers to the case of the common ancestor being a *male*.

The effect of the 9th section of the act in the converse case, that is, where the common ancestor is a *female*, seems to be summed up in the latter words of that section, namely, "that the brother of the half-blood on the part of the mother shall inherit next after the mother." Now, to put a case the reverse of that put by Littleton in section 7, it would appear that if a *woman* have issue, a son and a daughter, by one *husband*, and a son by another husband, and the *daughter* of the first husband purchase lands in fee and die without issue [her *mother* not surviving her; see Lit. s. 3, n.], the brother

by the second marriage, who is brother by the *half-blood* and *younger brother*, "shall have the lands by descent as heir to her," in preference to the brother by the first marriage, who is brother by the *whole blood*, and *elder brother*.

I do not know if this be clearly understood to be the operation and intention of the act, or whether, indeed, I have interpreted the act aright; but if I have, the case really does seem to me to be somewhat anomalous. Perhaps you, or some of your readers in the *MAGAZINE*, will be kind enough to enlighten me upon the subject.

I am, &c.,

G. S. (New Broad-street, City).

MOOT POINTS.

No. 32.—*Devise—Lapse—Conversion.*

A., by his will dated in 1839, devised all his real estates to trustees upon trust for sale. And he directed his trustees to stand possessed of the monies to arise from such sale upon trust, to pay the same unto his three sons, B., C., and D. in equal shares and proportions. B. died in the lifetime of A.

Upon the death of A., who became entitled to the share of B., the heir-at-law of A., or A.'s next of kin?

J. BEAUMONT (Witham).

No. 33.—*Copyholds—Lease.*

In 1845, A. being the owner of a copyhold estate, demised the same to B. for one year, and so from year to year until the end or expiration of the term of seven years, at the rent of £70 per annum. B. entered into possession, and has ever since held the estate. In December last, the lord of the manor died, and the lordship descended to B. who was his eldest son and heir-at-law.

What effect will such descent have upon B.'s interest in the estate demised by A.?

J. BEAUMONT (Witham).

No. 34.—*Killing Hares—Registering Authority.*

A. B. having obtained an authority to kill hares on the lands of C. D., brought such authority to the clerk to the magistrates for the division in which the lands are situate, to be registered according to the 11 & 12 Victoria, ch. 29, sec. 2. The clerk to the magistrates refused to register the same unless he was paid the fee of 2s. 6d.

It appears that the statute gives no authority for the payment of such fee: is such clerk therefore justified in such refusal, if not, what is A. B.'s remedy to compel him to do so?

H. G.

No. 35.—*Legacy.*

A., by his will bequeathed £1000 a piece to B., C., D., E., and F., to be paid to them, &c. when they should respectively attain the age of twenty-one years or marry; and in the case of either of them dying before they should attain that age, then he gave the legacies of them so dying unto the survivors, to be equally divided between them. B. and C. died minors. D. attained his age of twenty-one, &c., and received his legacy and shares of legacies which became due by reason of the deaths of B. and C.

Query.—In the event of E.'s dying a minor, *would* D. be entitled to participate with F. in the lapsed legacy by reason of the death of E.; and if so, would he also be entitled to a share of the shares which E. took, by reason of the deaths of B. and C. as aforesaid.

T. P. P.

No. 36.—*Dower—Conveyance, &c.*

An estate being mortgaged in fee, the mortgagor in 1836 contracts to sell the same to A. Before a conveyance is taken, the mortgagor dies, devising his real estate to his son; shortly after the mortgagor's death, his executors pay off the mortgage debt, but no reconveyance of the estate is taken. In 1843, in pursuance of the original contract for sale, the mortgagees, by the direction of the purchaser and the devisee, convey the estate to a trustee, "his heirs, and assigns, upon trust for A., his heirs and assigns for ever." By another deed of the same date, the devisee conveys to "A., his heirs, and assigns" (to uses to bar dower).

Is the wife of A. entitled to dower (she being married before the dower act), and could A. convey both the legal and equitable estates by exercising his power of appointment? E. C. (Lincoln).

ANSWERS TO MOOT POINTS.

No. 50.—*Devise* (vol. v., p. 306).

For the information of those of your readers who may feel interested in this point, we beg to inform them that the question was raised in the year 1774, on the construction of the will of Edward Wharton, Esq., who devised unto his nephew, Anthony Wharton, and to his sons in tail male, and for want of such issue male, to his brother John Wharton, and to his sons in tail male, and on failure of such issue male, then to testator's right heirs: when an amicable suit was in-

stituted to determine the same. And it was held that Anthony Wharton took an estate tail. The case will be found reported in 2 W. Black. 1083; *sub nomine*, Wharton v. Gresham.

G. B. HAYWOOD.

I. D. NORWOOD.

No. 36.—*Right of Way* (vol. vi., pp. 168, 347, 433).

I cannot agree with W. W. T. in his opinion on this point, viz., that a right of way would accrue as against the lessees for lives, till the expiration of the term. I am of opinion that no such right would accrue either against the archbishop or the lessees. See *Bright v. Walker*, 1 Crompton Mees. and Roscoe, 211, where it was held that "the statute 2 & 3 Will. 4, c. 71, does not give a title to a right of way over lands held under a lease for lives granted by a bishop by reason of an adverse user for twenty years during the lease, either as against the bishop, the lessee, or those claiming under the lessee."

We tried a cause exactly in point with the one I have cited, in which we were concerned for the defendant, and the case of *Bright v. Walker* was cited on behalf of defendant. Mr. Baron Alderson who tried the cause, said: "He should certainly abide by the case of *Bright v. Walker*," and ordered a verdict to be entered for defendant accordingly; the following term the plaintiff moved for a rule nisi for a new trial, which was refused; therefore I think this fully established the question that no right of road can accrue over lands held under a lease for lives granted by a bishop, either as against the bishop, the lessee, or those claiming under the lessee.

HENRY GLAISTER.

No. 49.—*Insolvency* (vol. vi., pp. 262, 347, 349, 394).

The point, as stated, is defective in two points: it does not state whether G. F. assented to the transfer, nor the amount of the respective debts.

Assuming that A. B. owed C. D. *as much as or more* than G. F. owed A. B., and that G. F. assented to the transfer to C. D. of his debt to A. B. [as it appears from vol. vi., p. 394, that he did], the debt from A. B. to C. D. would, by such transfer and assent, be totally extinguished, and C. D. can sue G. F. in his (C. D.'s) name. As the debt from A. B. to C. D. would be extinguished actually in the manner above mentioned, it is clear that the assignees have no claim against G. F. [See *Leigh's Nisi Prius*, 52—54; *Price v. Seamen*, 4 Barn. and Cres. 528; 6 Law Stud. Mag. 353; but see the American case there stated.]

Assuming, on the other hand, that G. F. did not assent to the transfer, then C. D. cannot sue him in his own (C. D.'s) name (because one

man cannot make his debtor a debtor to a third person without the debtor's consent). But C. D. must sue in *A. B.*'s name. *A. B.* would have to bring the action; and if *G. F.* pleaded the insolvency and bankruptcy of *A. B.*, or any matter showing that *A. B.*'s right of action had passed to his assignees or trustees, it would be a good answer to such plea, by way of replication, that previously to the bankruptcy, or, &c., he (*A. B.*) had transferred the debt to one C. D., for whom he was then suing as trustee. For the latest case on this point see *D'Arnay v. Cheesman*, 14 Law J., Ex. 190.

I just add, that if the debt transferred be not greater than the one for which it is transferred, the transfer is good at common law; and, as you will see from my observations above, the transfer is not affected by the subsequent bankruptcy. [See *Crowfoot v. Gurney*, 2 Moo. and Sco. 473; S. C. 9 Bing. 372; 2 Harrison's N. P. 1306.]

The transferee need not have recourse to equity. [See *Pract. Equity*, 72.] W. H. WARNER.

NOTE.—The above answer was received prior to the insertion of the explanation in vol. vi., p. 394, by which it appears that *G. F.* acknowledged the receipt of the authority. We have ventured to add some references for the benefit of our subscribers.—EDS.

No. 66.—*Railway—Compulsory Powers* (vol. vi., p. 340).

Though I have been able to find no case precisely in point, yet I am of opinion that, under the circumstances, the company can compel *K.* to sell the land required, though it must be borne in mind that the service of a notice to treat on the solicitor of a party is not a valid service under the 19th section of the Lands Clauses Consolidation Act, 1845; but the question raised is not with regard to the validity, but the effect of the service.

In *Shelford on Railways* (p. 205, 1st edit.) it is stated: "The moment the company has given the proper notice, &c., the relative situation of vendor and purchaser is created by such notice (vide *Doo v. London and Croydon Railway*, 1 Railway Cas. 207; *Salmon v. Randall*, 3 My. and Cr. 439). It gives the proprietor a right to insist upon the company taking what they have stated their intention to take by the notice." And surely, if so, it also gives the company a right to insist upon the vendor (*K.*) selling the land comprised in the notice. "A right," continues *Shelford*, "to be enforced by the Court of Chancery, or by a court of law by mandamus." If indeed the service of the notice to treat is not all that is required before the compulsory powers expire, I can imagine nothing less than the completion of the purchase being sufficient; for, according to *Shelford*, the service of the notice "constitutes a contract, or, at all events, the

situation of vendor and purchaser ;" and no other situation can be constituted but that of vendor and purchaser until the purchase be completed.

W. H. T.

NOTE.—See *Brocklebank v. Whitehaven Junction Railway Company*, 16 Law Journ., N. S., Chanc. 471 ; 11 Jurist, 653, where the V. C. of England seemed to think that the company could not proceed to obtain possession of land after the expiration of a previous notice, and though a jury had been summoned in due time, but the verdict not returned till after the limited period. We have, however, some indistinct remembrance of a different decision, but cannot, at this moment, find it.—Eds.

No. 99.—Rule in Shelly's Case (vol. vi., p. 435).

We have received a communication from the gentlemen who answered this point, stating that there is a doubt as to the correctness of the answer, and requesting our opinion. We do not consider the main point; namely, whether the intervention of B.'s estate prevented the rule in Shelly's case from operating, as incorrect, but the answer might have been a little more explicit as to the different estates taken by A. and B. We find it somewhat difficult to express in technical legal phraseology the kinds of interests taken by these parties. However, we shall make ourselves understood when we say that A. takes an immediate estate for life in the whole, with a *vested* remainder in a moiety in fee, though such remainder is not executed in *possession*, as it is not an immediate, but only a mediate remainder. In fact, the inheritance is executed, as to that moiety, in *interest* only. Should B. die, living A., the latter would have a life estate in a moiety and a fee executed in *possession* in the other moiety. As to B.'s estate, he has a *vested* estate for life in remainder in the whole, with a *vested* remainder (of course not executed in *possession* whilst A. is living, but still an *immediate* remainder) in a moiety. When A. dies, B. is entitled to an immediate estate for life in the whole, with a *vested* remainder executed in *possession* in a moiety.

The best way to distinguish the estates would be to divide them into moieties, and call one Y. and the other Z. As to Y., A. is seised for life, the remainder to B. for life ; remainder to A. in fee. As to Z., A. is seised for life, with remainder to B. and his heirs.

It is, however, not to be concealed, that a question may be raised whether or not the limitation to the heirs gives a *distinct* interest by way of remainder, capable of transfer as such. The point, however, is rather speculative than practical.

For further information as to this Moot Point, we refer to *Fearne's Rem.* 35, *et seq.* ; *Co. Litt.* 182, 299b ; *Merrifield's Wath. Convey.* 172, 173, 174 ; 1 *Prest. Estates*, 323, 336, 340.

Eds.

No. 22.—*Mortgage—Devise* (vol. vi., p. 120).

C., at the time of his death, had of course the legal and absolute estate in him, with power to sell and convey in fee; and at his death, I think, under the circumstances of the case, his whole interest in the trust and mortgaged estate would pass to his three daughters as his co-heiresses at law. Not as devisees, however, by his will; for although, according to strict legal construction, the words "*devise* all the residue of my estate" would be sufficient to pass the trust or mortgaged estate, according to the authority of several cases in point (*Midland Railway Co. v. Oswin*, 13 Law Journ., N. S., Chanc. 209; *Doe d. Evans v. Evans*, 8 Law Journ. Q. B. 212; *Jones v. Skinner*, 5 Law Journ. Chanc. 87); yet I scarcely think, in this present case, the three daughters would take the trust estate by such devise, for the testator has, in my opinion, evidently had personalty only in his mind when he devised the residue of his estate to his three daughters, subject to the payment of his debts and funeral and testamentary expenses, and the courts would construe according to the testator's intentions; however, be that as it may, the three daughters would, there is no doubt, take the trust or mortgaged estate either as devisees, if the same passed to them by his will; or, if not, then as his co-heiresses at law; and the whole legal inheritance would, in either case, vest in them. Being, then, vested in them, they would seemingly be the proper parties to exercise the power of sale; and as they unite in themselves the character of executors for the reason that the interest they take under testator's will is given to them subject, in a manner, to pay his debts, they may, I think, in such capacity, receive the purchase money and retain thereout what may be due to them as *residuary legatees*; but it might perhaps be as well that the executors appointed by the will of C., the testator, should join for the purpose of giving their assent.

C. W. (Kendall).

No. 14.—*Purchase—Principal and Agent* (No. 3, N. S., p. 43).

The board minute presuming the same to have been made in pursuance of the company's orders would, I think, be a sufficient authority for A. to act in the capacity of agent to the company in the purchasing of land in his name for the use of the company. Now, an agent is never permitted, in equity, to reap any advantage by becoming secret purchaser of property which he is authorised to buy for his principal; but where he is so employed to purchase for another he is considered as the trustee of his employer (*Smith's Eq. Juris.* 69; *Eq. Princ.* 72; and see the case of *Lees v. Nuttall*, 1 Russ. and Myl. 53, there referred to). A., then, in the present case, as such agent, would undoubtedly be considered as the trustee of his employers, the company; and as there, therefore, exists between

the company and A. the position of principal and agent, proceedings must necessarily be brought against the company as principals, a principal being in all cases liable for all contracts entered into by his agent, unless such contracts exceed the principal's authority (Com. Law Prin. 70—71).

With regard to the question, What is a sufficient appointment of an agent by an incorporated company to purchase land? I should certainly consider a paper writing, under the hands of two or more of the directors of such company, or even a board minute made by their secretary according to their instructions, appointing a person to be their agent for the purposes therein mentioned, a sufficient appointment, though it might perhaps be more preferable to have the appointment made by instrument under seal.

CHARLES WILKINSON.

NOTE.—It seems to us that an ordinary corporation could not appoint an agent for purchasing land except by deed, this not coming within any of the exceptions allowed, such as the performance of small indispensable acts, as the appointment of a servant, cook, butler, &c. (Com. Dig. tit. "Franchises," F. 13; *Pain v. Strand Union*, 15 Law Journ., N. S., M. C. 89; 10 Jur. 308) Neither do we think that the fact that the land was (as we suppose was the case) required for the purposes of the company would bring the case within another exception, by some of the cases, namely, contracts which are necessarily incident to the purposes and objects for which the corporation was created (See *Beverley v. Lincoln Gas Co.*, 6 Adol. and El. 846; S. C. 3 Nev. and P. 35; *Corp. of Ludlow v. Charlton*, 6 Mees. and W. 815; S. C. 4 Jur. 657). However, the courts have in some late cases treated joint-stock companies as corporations for some purposes only, and have, therefore, held that they may in certain cases be bound by contracts not under seal (*Ridley v. Plymouth Grinding Co.*, 17 Law Journ., N. S., Exch. 252; S. C. 12 Jur. 542; stated 6 Law Stud. Mag. 377. See also *Favell v. East. Counties Railway Co.*, 17 Law Journ., N. S., Exch. 297). It is probable that the act under which the railway was constituted contains some provisions as to contracts; but if not, then we must refer to the Public Companies Clauses Act, 8 Vict., c. 16, by s. 97 of which, contracts may be in writing, or in certain cases by parol only. This act, however, only applies to companies thereafter incorporated by statute. Supposing the case to come within the statute, we think the appointment of agent was sufficient (See *Hodges' Law of Railways*, 109, 110; *Chambers and Peterson's Law of Railw. Comp.*, 521, *et seq.*) Supposing the agent to have been duly appointed, and to have acted within the scope of his authority, and not to have contracted under seal, the vendor could sue the principals, or the agent, as he was not known to be acting

as such (Princ. Com. Law, 71, 72). But supposing that he was not duly appointed an agent, then clearly he was acting as a principal, and so would be liable accordingly.—Eds.

No. 14.—*Purchase—Principal and Agent*—(No. 3, N. S., p. 43).

If A. purchased the land, and signed the contract in his own name, and not as agent for the railway company, and the vendor had no notice thereof at the time of sale, A. alone would be responsible to the vendor for fulfillment of the contract, and any proceedings taken thereupon must be brought against A. only. But if the company have since acknowledged A. as their agent, an action may be brought against the principal, upon proof thereof.

In *Magee v. Atkinson*, 6 Law J. R., N. S., Exch. 115, 2 Mees. and W. 440, where plaintiff bought of defendant some railway shares, and note of the contract signed in defendant's name only was sent to plaintiff, and afterwards another, saying the shares were sold on account of "H. I." Both notes kept by plaintiff. On action brought for breach of agreement in not completing the sale: Held, that it was no misdirection to leave it to the jury to say which was the contract, and to tell them that if the defendants signed their own names they were liable. Held, also, that evidence to show custom that principal's name not usually inserted was properly rejected.

As the vendor would look to A. for completion of the contract, the question whether the authority to act as agent for the company be valid or not, would be as between A. and the company only.

I think the authority here to be insufficient, it not being under the common corporate seal, which is required from a corporation (though it is different with *sole*), and that the general rule as to *implied* authority would not here apply.

CAROLUS.

NOTE.—This answer is very nearly correct. But supposing the agent to have been sufficiently authorised, it is clear the company might be sued on his contract (if not under seal), though he purported to contract as principal (See Princ. Com. Law, 70—72, and the cases there mentioned); in fact, the vendor could elect to sue either.

No. 14.—*Purchase—Principal and Agent* (No. 3, N. S., p. 43).

Another correspondent says: "In a case which lately came under my own notice, an eminent Queen's counsel gave his opinion that even where a contract for the purchase of land on behalf of a railway company, for the purposes of the railway, had been entered into by an agent who was in the habit of buying land for that railway company, and the company had entered into possession, the vendor could not maintain an action against the company for non-payment

of the purchase money, because the agent was not appointed by an instrument under seal, but that the vendor's only remedy was by ejectment, after tender of a conveyance." J. W. P. M.

No. 11.—*Mortgage—Sale—Surplus* (No. 2, N. S., p. 30).

I conclude, though it is not so stated, that the mortgaged property is *realty*. If this be so, the surplus produce of the sale will be considered as part of A.'s real estate (see Jarman's Conveyancing, 3rd edition, vol v. p. 617, note b, and Hayes's Introduction, 4th edit., 427 n), and that notwithstanding the proviso in the mortgage deed, that same should be paid to "A., his *executors or administrators*." A.'s executors or administrators will, I conceive, be simply trustees for the parties entitled to his real estate.

J. C. R.

NOTE.—The correctness of the above answer will be more evident when it is considered what are the principles applicable to the case. In the first place, then, a mortgage is a debt by specialty, for securing which, a creditor receives the security of the debtor's lands (6 Law Stud. Mag. 244). Being but a debt, it follows that, as between the real and personal representatives of the debtor, the personal estate is primarily liable to the payment of the debt, and must indemnify the real estate against it (Coote's Mortg. 457). In fact, the personal estate has received the benefit by the mortgagor's receipt of the amount at the time of the mortgage, and it must bear the burthen (this, however, only applies where the debt is that of the party deceased). To allow the personal estate, in the case put in the Moot Point, to receive the surplus arising from the sale of the estate, would be most unjust to the real representatives; it would be to make a profit by a property not belonging to it, and for the price of which very property such personal estate is liable to the heir, &c.—EDS.

No. 11.—*Mortgage—Sale—Surplus* (No. 2, N. S., p. 30).

I am of opinion, from what I conceive to be the facts of the case, that the surplus of the sale money must be considered as part of A.'s *real* estate, to which the heir is, of course, entitled. In *Wright v. Rose*, 2 Sim. and Stu. 323, a similar case to the one in question, it was decided that if the sale had taken place "in the lifetime of the mortgagor, the surplus of the sale monies would have been personal estate, but the estate not being sold at the mortgagor's death, the equity of redemption descended to his heir, and he was entitled to the surplus arising from the sale." Here, I presume, the sale took place after A.'s decease, and this case will, therefore, come within the reason of the above decision (See Cruise's Digest, vol. ii., p. 79).

ROBERT W. HILLMAN (Lyne).

No. 16.—*Transfer of Mortgage—Stamp* (p. 43, N. S.).

I have referred to all the cases cited, and also to *Doe dem. Crawley v. Gutteridge* (17 Law Journ. Rep. Q. B. 99). The transfer will require a common deed stamp of £1 15s. There not being a further advance, the transfer only creates a fresh security, and by 3 Geo. 4, c. 117, s. 1 (which repealed the duties imposed on transfers by 55 Geo. 3, c. 184), on instruments of that kind, a duty of £1 15s. on the first skin, and a progressive duty of £1 5s. is imposed.

That the transfer in this case is liable to the deed stamp there can be no doubt, as there is a fresh covenant entered into by the heir-at-law, and by which he is bound whether he had assets by descent or not; his personal representatives are also bound by it; it creates a new mode of liability; and, as Lord Denman observed in *Crawley v. Gutteridge*, a new mode of liability is the same thing as if a new party had been introduced by the deed, and for that reason he thought the stamp insufficient (*i. e.*, it required the deed stamp). *Crawley v. Gutteridge* is the latest case on the subject. J. A.

No. 16.—*Transfer of Mortgage—Stamp* (No. 3, N. S., p. 43).

It appears to me quite unnecessary in dealing with this case to go into any of the several points raised in the cases referred to in this Moot Point; as they all relate to transfers of mortgages, *with a further advance*, and "*an additional or further security*" for the original sum. *Humberston v. Jones*, and a still later case, *Doe dem. Crawley v. Gutteridge*, 12 Jur. p. 51, are decisions bearing principally upon what does and what does not constitute a further security for the original sum. The latter case decided that a covenant for payment of the principal and interest by one not a party to the original deed, though bound by the covenant in that deed, is an additional security under the 3 Geo. 4, c. 117, and that as such an *ad valorem* stamp on the further advance is not alone a sufficient stamp, and though the judges studiously avoided giving any opinion on this point, I think we may gather from the act and the previous cases that the wanting stamp is a £1 15s. or deed stamp, and not, as some suppose, an *ad valorem* on the whole sum, including the original sum.

But be this as it may, that case only decides with regard to this point that *there is an additional or further security* for the original sum of £330, but does not (nor do any of the cases) touch on the stamp it requires, inasmuch as in this case there is no further advance. But by referring to the act itself I find it expressly enacted by sect. 2, that "upon any transfer, assignment, &c., of any mortgage, &c., provided no further sum of money be added to the principal money

already secured, there shall be paid a stamp duty of £1 15s., &c., and a further progressive duty of £1 5s." And then in the 3rd section it is enacted, "That where any deed or other instrument made as an additional or further security for any sum on which the *ad valorem* duty shall have been paid, such deed shall be exempt from the several *ad valorem* duties charged on mortgages, and shall be charged only with the ordinary duty payable on deeds in general.

I can, therefore, see no doubt but that a deed stamp of £1 15s. for the transfer of the mortgage, and another deed stamp to cover the further security, with £1 5s. followers, would be the necessary stamps for the deed in question.

T. H. W. (Louth).

[Moot Point.]—No. 37.—*Insolvent Debtor.*

F. G. contracts debts in England: can he take the benefit of the insolvent act in *Guernsey* for those debts?

INDOCTUS.

[Moot Point.]—No. 38.—*Joint Tenancy—Tenancy in Common.*

By a deed of settlement on the marriage of A. B. and C. D., £900 bank stock was given upon trust for the said C. D. for her life notwithstanding her coverture, and after her decease, upon trust, for the benefit of such child or children of the said C. D. as should be living at the time of her decease, if more than one, "*in equal shares and proportions.*" Do these words constitute a tenancy in common or a joint tenancy?

INDOCTUS.

HILARY TERM EXAMINATION ANSWERS.

VII. *Witnesses—Creditors of Bankrupt.*—It will be seen by the case of *Belcher v. Drake* (2 Car. and Kirw. 658; stated in Com. Law Abridgm., tit. "Witness" p.), that it has been decided that a creditor of the bankrupt is not a good witness to support an action by the assignees. Therefore our statement at p. 50, answer VII, must be modified accordingly. We may state that the general opinion of the profession was in accordance with what we there stated, and, indeed, in a case of *Columbine v. Pennell* and another, assignees, &c., Lord Denman at *nisi prius* admitted the evidence of creditors to prove the trading, and this in an action by the bankrupt to try that question. However, a rule *nisi* has since been obtained on this point, and when a decision is given, we shall duly notice it.

We find that the above case of *Belcher v. Drake*, could not be inserted in the present number.

EASTER TERM EXAMINATION ANSWERS.

COMMON LAW.

I. *Feme covert suing alone*.—A feme covert cannot as a general rule sue alone, but if her husband be attainted, or even transported, she may sue alone. So if the husband be an alien enemy, she may sue alone. So she may where her husband has gone abroad, or absented himself, and has not been heard of for seven years. So also where there has been a divorce *à viaculo matrimonii* (see Co. Litt. 132b, 133a; Bacon's Abr. tit. "Baron and Feme," M.; 2 Mees. and W. 61; 1 Bing. N. C. 139).

II. *Distress—Lodger's goods*.—A landlord may distrain the goods of lodgers being on the premises, for rent due from his own tenant; for all movables, on the premises, unless privileged, to whomsoever belonging, may be distrained for rent in arrear (see Gilb. Distr. 35; Bacon's Abr. tit. "Distress;" First Book, 266).

III. *Time for selling distress*.—Goods distrained cannot be sold until the expiration of five days from the taking of the distress; one day being reckoned inclusive, and the other exclusive (Selw. N. P. 682, 11th edit.; 6 Car. and Pay. 166; 1 H. Black. Rep. 13). A reasonable time after the expiration of the five days is allowed to the landlord for appraising and selling the goods (Pitt v. Shew, 4 Barn. and Ald. 208); but if the goods remain on the premises beyond a reasonable time without the tenant's consent, the distrainor, after the expiration of that time, becomes a trespasser for the excess (Griffin v. Scott, 2 Stra. 717; 2 Lord Raym. 1424; Princ. Com. Law, 163).

IV. *Statute of limitations*.—A simple contract debt is barred by the statute of limitations after six years from the accruing of the cause of action, if the plaintiff were not under disability at the time of his right of action accruing (see Princ. Com. Law, 296—302; add reference to Townsend v. Deacon, 13 Jur. 298, as to plaintiff being abroad at time of action accruing and there dying).

V. *Misjoinder of plaintiffs*.—If too many plaintiffs be joined in an action of contract, the plaintiff may, if he please, and the misjoinder appears on the face of the declaration, demur, move in arrest of judgment, or bring a writ of error, and if it do not so appear, it is ground of nonsuit at the trial (2 W. Saund. 116a, b; 10 Moore, 446; Browne's Actions, 307).

VI. *Non-joinder of partner*.—When one only of several partners, or other joint contractors is sued, he should plead the non-joinder

THE EVIDENCE ACTS. The first of these is the Evidence Act, 1875, which is the principal Act. It is followed by the Evidence Amendment Act, 1877, and the Evidence Amendment Act, 1899. The Evidence Act, 1875, is the principal Act, and it is followed by the Evidence Amendment Act, 1877, and the Evidence Amendment Act, 1899.

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pleas on the record, a writ of enquiry may be issued ; but if there are other good pleas, no writ can issue, though if they go only to *part* of the cause of action a *venire de novo* may be awarded. On judgment *non obstante veredicto*, neither party is entitled to the costs of the immaterial issues (3 Moo. and Sc. 69). Nor is either party in general entitled to the costs of the application for it, if successful ; but if the rule for it is discharged generally, the successful party is entitled to the costs of showing cause against it, as costs in the cause (13 Law Journ., N. S., Q. B. 73), and the defendant has been held entitled to the costs of opposing the rule made absolute, where the judgment *non obstante veredicto* was afterwards reversed in error (*Evans v. Collins*, 14 Law Journ., N. S., Exch. 257).

XIII. *Judgment against joint-stock company*.—Where a judgment has been recovered against the registered officer of a joint-stock company, it may be enforced against any of the members of the company, by *scire facias*. Ten days previous notice of the intention to apply for the *scire facias* must be given (7 & 8 Vict. c. 110, s. 68 ; *Corden v. Universal Gas Company*, stated Abr. Com. Law Pract. in 1 Law Stud. Mag., N. S., 13). Sect. 68 enables the court to grant execution in certain cases without such *scire facias* or even a suggestion (*Thompson v. Universal Salvage Company*, stated *Id.* 29, 30). A plaintiff cannot proceed by *scire facias* where an order has been made for winding up the company under the 11 & 12 Vict. c. 45, and an official manager has been appointed (*Ibid.*).

XIV. *Warrant of attorney, attestation*.—A warrant of attorney, except where given by counsel, special pleader, or attorney, must be attested by an attorney, and the attestation must state that he subscribes his name as such attorney, and declare that he is attorney for the person executing the same (see Pract. Com. Law, 343—346 ; also *Gray v. Hall*, stated Abr. Com. Law Pract. in 1 Law Stud. Mag., N. S., 17). It is usual, though not necessary (*Ibid.*), to state that the attorney was expressly named by and attended on behalf of the defendant.

XV. *Ejectment*.—The first proceeding in an ejectment is the delivery of a declaration and notice thereto subscribed. The service must be on the tenant, or upon his wife, son, or servant, but in these latter cases the service must be on the premises, except in the case of a wife, when it will do if she is shown to be living with him at the place where the service is effected (see Pract. Com. Law, 422, 423).

EQUITY.

1. *Statute of limitations—Fraud*.—In cases of fraud, the old rule of equity was that the time would not begin to run till the party acquired a knowledge of the facts constituting the fraud (*Blennerhasset v.*

Day, 2 Ball and Beatt. 129; Pract. Eq. 185, 186). And by 3 & 4 Will. 4, c. 27, s. 26, it is expressly enacted that in cases of fraud no time shall run whilst the fraud remains concealed; but this is not to affect a *bond fide* purchaser for valuable consideration without notice, and having "no reason to believe that any fraud had been committed" (see further Pract. Eq. 185, 186).

II. *Prayer of relief*.—The omission of the prayer for general relief (see Pract. Eq. 99) will be fatal to the bill where the plaintiff has mistaken his special prayer of relief (except in the cases of charities and infants), unless the court should allow an amendment (see Story's Eq. Plead. s. 40).

III. *Affidavit annexed to bill*.—The bill must be accompanied with an affidavit in the three following cases:—1st. In a bill of interpleader, and it must be sworn that the plaintiff does not collude with any of the defendants; and if money be due from him he must either bring it into court, or offer by his bill so to do (Princ. Eq. 232, 233). 2nd. In a bill to perpetuate testimony, the plaintiff must make an affidavit that the witness is of the age of seventy; that the matter to be proved is material, and lies within the knowledge of one person only; or that the witness is going out of the jurisdiction, and not likely to return in time to be examined. And 3rd. In a bill to obtain the benefit of an instrument on which the plaintiff might proceed at law, there must be an affidavit that the instrument is lost. Or if the bill be for discovery of an instrument suggested to be in the power or custody of the defendant, and praying relief that might be had at law if the instrument were in the hands of the plaintiff, there must be an affidavit that it is not in the custody or power of the plaintiff, &c. (see Pract. Eq. 104, 105). The want of the affidavit must be taken advantage of by demurrer (Pract. Eq. 167; Hook v. Dorman, 1 Sim. and Stu. 227; 12 Sim. 35).

IV. *Time for demurring, answering, &c.*—If the defendant demur alone, he has twelve days after appearance to do so. The time for pleading and answering is six weeks after appearance (Pract. Eq. 134, 135, 170). The time may be enlarged on showing proper grounds for same. The application must be to the Master, by taking out a warrant (Pract. Eq. 135, 136).

V. *Plea accompanied by answer*.—If there is any statement or charge in the bill which affords an equitable circumstance in favour of the plaintiff's case against the matter pleaded (such as fraud or notice of title), that statement or charge must be denied by way of answer (see Pract. Eq. 187—189, where the instances and cases are more fully stated).

VI. *Enforcing full answer*.—If the defendant has put in an insufficient answer the plaintiff should take exceptions thereto, and if not

submitted to, should afterwards refer same to the Master and obtain his report of insufficiency. The defendant is usually allowed a further time to answer the parts excepted to, and if he does not answer them fully, the plaintiff may refer the answer on the old exceptions, and so on again; but on the third reference for insufficiency defendant is to be examined on interrogatories, and to stand committed until he perfectly answers such interrogatories (Pract. Eq. pp. 240).

VII. *Protection from discovery*.—A defendant need not answer as to matters which will subject him to forfeitures, penalties, or other pains (Princ. Eq. 447; Pract. Eq. 200). So where he has no interest and might be examined as a witness. So any matter which will tend to criminate him, or disgrace him (Pract. Eq. 168, 187, 200). So a purchaser for valuable consideration will not be obliged to answer as to matters which may affect his own title (Pract. Eq. 187).

VIII. *Evasive and insufficient answer*.—An evasive answer is where the defendant merely answers the charges literally without confessing or traversing the subject of each charge or rather interrogatory. If an answer is so evasive that it is a mere delusion, it will be considered as no answer at all, and the court will order it to be taken off the file (see and compare Story's Eq. Plead. s. 852; Smith v. Serle, 14 Ves. 415; Tomkin v. Lethbridge, 9 Id. 178; Thomas v. Lethbridge, *Ibid.* 463; Cooper's Eq. Plead. 313). Lord Eldon in Thomas v. Lethbridge, intimated that such answer ought to be considered as a contempt, and the defendant be committed to prison. An insufficient answer is where the defendant does not fully answer the interrogatories in the bill. In this case the answer is referred to the Master, on exceptions taken by the plaintiff, and the Master looks into the answer, and either reports it sufficient or insufficient (Pract. Eq. p. 234).

IX. *Waiving exceptions to answer*.—The plaintiff waives his right to except to an answer for insufficiency, by obtaining an order to amend his bill (Pract. Eq. 235). So where he does not except within due time, namely, six weeks (Pract. Eq. 236).

X. *Answer*.—An answer serves two distinct objects:—It furnishes the result of an examination of the defendant upon the allegations, or at least the interrogatories, in the bill. 2. It informs the plaintiff and the court of the nature of the defence upon which the defendant means to rely (1 Dan. Pract. 676).

XI. *Production of documents*.—The defendant must, on motion by the plaintiff for inspection, produce all such documents as have been admitted by the defendant's answer to be in his possession or power, unless he denies the plaintiff's title, or the documents relate exclusively to the defendant's case, or they are privileged communications, that is, cases for counsel's opinion, communications with professional men, &c. (2 Dan. 1661).

XII. Security for costs.—Security for costs is required from a plaintiff where he has wilfully misdescribed himself in the bill, or has not stated his place of abode, or is out of the jurisdiction (6 Law Stud. Mag. 421, 457; Pract. Eq. 93, 94).

XIII. Pro confesso—Traversing note.—Taking the bill *pro confesso* is grounded on the contumacy of the defendant in not answering, which is considered as an admission of the plaintiff's case, and that the facts stated in the bill are true, in which respect it is analogous to judgment by default for want of plea at law (Pract. Eq. 147). On the other hand, by filing a traversing note, the plaintiff makes the defendant in effect deny the allegations in the bill (Pract. Equity, 152, 153).

XIV. Bill and answer.—A cause is set down on bill and answer where the defendant has by his answer suggested that the bill is defective for want of parties (Pract. Eq. 244—246). It is somewhat analogous to a proceeding on plea in abatement at law.

XV. Changing residence and amending.—If a plaintiff changes his residence after filing his bill, and then amends, he should describe himself as of his new residence, otherwise the defendant may, if the misdescription has been wilful, obtain security for costs (see Answ. XII., and 6 Law Stud. Mag. 421, 457).

BANKRUPTCY.

I. Bankrupt.—In order to make a person bankrupt there must be—1. A trading. 2. An act of bankruptcy; and 3. A good petitioning creditor's debt.

II. Trader.—A general description of a trader within the meaning of the bankrupt is "a person seeking his living by buying and selling," or "using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment or otherwise, in gross or by retail." The principle which determines whether a person is a trader within the meaning of the bankrupt acts in respect of the extent of his trading is his intention or not to deal generally, and not the extent or quantity of dealings. For though in general one single act of buying and selling will not make a man such a trader without proof of his intention to continue such a course of dealing, yet trading in a very small degree will sustain a fiat if there is an intention to deal generally (2 Black. Com. 476; exp. Lavender, 4 Deac. and Ch. 484; exp. Moule, 14 Ves. 602).

III. Petitioning creditor's debt.—The petitioning creditor's debt must be a legal and not an equitable debt (2 Vesey, jun. 407; 1 Atk. 147).

IV. Steps in bankruptcy.—In order to make a trader bankrupt, the petitioning creditor must make an affidavit of his debt and present a petition for the fiat. The bond is dispensed with now. The

fiat is bespoken on the docket being struck, and is forwarded to the court or commissioners. A commissioner is balloted for where there are several commissioners, and then the petitioning creditor proves his debt, and the trading and act of bankruptcy being also deposed to, the commissioner adjudges the trader a bankrupt. Notice of this adjudication is given to the trader, and if good cause not shown, it is published in the *Gazette*, and the days for meetings are appointed (see First Book, 249).

V. *Affidavit of petitioning creditor*.—The petitioning creditor's affidavit (as is the case with other affidavits) may be sworn before the court of review [now Vice-Chancellor Knight Bruce], one of the subdivision courts, or any commissioner, the Master or any Registrar of the Court of Bankruptcy, a Master in Chancery, or in Scotland or Ireland, before a magistrate of the county, town, or place where the affidavit is sworn; or elsewhere, before a magistrate, and attested by a notary, or before a British minister, consul, or vice-consul. The solicitor to the fiat (*i. e.*, to the petitioning creditor) may administer the oath, if a commissioner, to the petitioning creditor, but this cannot be done in any other case (1 Rose, 145; 1 Gl. and Jam. 16; 5 Taunt. 89). The petitioning creditor must attend personally to open the fiat, unless it be specially dispensed with, as in case of illness, great distance, and consequent expense, &c. (1 Deacon's Bankr. by De Gex, 145).

VI. *Annuling fiat*.—A bankrupt may annul the fiat if improperly issued, by petition. The adjudication may be annulled by showing before the commissioner that there are not sufficient requisites (5 & 6 Vict. c. 122, s. 23). The petition to annul the fiat must be presented within twenty-one days after the advertisement of the adjudication if the bankrupt were then within the United Kingdom, but if in any other part of Europe then within three months, and if any where else a period of twelve months is allowed. However, the bankrupt may still impeach the validity of the fiat after these periods on other grounds than the defect of requisites, as, for example, on the ground of fraud (*exp. Phipps*, 3 Mont. Deac. and De Gex, 488; Archb. Bankr. 392, 10th edit.; Deac. Bankr. Pract. 848, 2nd edit.).

VII. *Debts proveable*.—The general rule is, that all debts may be proved under a fiat, for which, if payable at the time, the creditor might have had his remedy against the bankrupt, either at law, in equity, or otherwise, in his own name, or in the name of any other. There must be a debt, of an amount either actually ascertained, or which may readily be ascertained by computation, without the intervention of a jury, and not merely a claim sounding merely in damages, and those damages unliquidated. Indeed, it may be stated as the result of very many cases on this intricate subject, that where damages are contingent and uncertain, as in some cases of demands

founded on *contract*, and in *all* cases of *tests*; where both the right to any damages at all, and also the amount of them, depend upon circumstances, of which a jury alone can properly judge, and which, therefore, it requires the intervention of a jury to ascertain, such damages are not capable of proof. But in cases where, although the usual form of action which a creditor would have for his demand, may be one in which he would recover it in the shape of damages to be given by a jury; or though, perhaps, in some instances, he could have no other kind of action; yet if his demand is of such a nature as admits of being liquidated, and ascertained at the time of the bankruptcy, so that he can swear to the amount, he will be entitled to prove (see 5 Law Stud. Mag. 225):

VIII. *Contingent debts*.—Formerly debts payable upon a contingency which did not happen before the issuing of the commission, were not proveable. But now by 6 Geo. 4, c. 16, s. 56, if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt shall have been contracted, may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such persons to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends, provided that such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed (see further 5 Law Stud. Mag. 225—227; 6 *Id.* 231).

IX. *Proof where security*.—The general rule is that if a creditor hold a security either by way of mortgage, lien, deposit, &c., from the bankrupt *alone*, he will not be allowed to prove for his debt upon the estate unless he first give up the security for the general benefit of the creditors, or realise it under a power so to do (5 Law Stud. Mag. 293; 6 *Id.* 250).

X. *Surrender*.—The bankrupt must surrender on the 60th day at the farthest from the advertising of the adjudication, unless the period be specially enlarged. The surrender implies a submission to be examined and to make discovery of all his estate. If the bankrupt do not surrender in due time and submit to be examined and make discovery, &c., he will be guilty of felony and be liable to transportation for not less than seven years or imprisonment (with or without hard labour) for not more than seven years (5 & 6 Vict. c. 122, s. 32).

XI. *Adjournment sine die*.—An adjournment *sine die* is usually where the answers of the bankrupt at the last examination are so

unsatisfactory that the commissioner does not feel himself justified in passing his examination, and yet not sufficiently so as to justify them in committing him (Cook's Bankr. 431; 5 & 6 Vict. c. 122, s. 23). It prevents the estate being put to any further expense by useless adjournments, and the bankrupt must pay the costs of any meeting to take his final examination (unless, indeed, he swear that he has not the means of paying for a meeting, *re* Crossley, 1 Mont. and Ch. 40), whilst its effect is by leaving the bankrupt subject to arrest after the expiration of his protection, if any (not exceeding three months), and preventing his applying for his certificate, to make it his interest to give the information required.

XII. Certificate.—The effect of the certificate is to discharge the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands whatever which were proveable under the fiat. Besides this the certificate entitles him to enjoy, free from the claims of his assignees all future acquired property (2 Steph. Com. 147, 2nd edit.; see further 6 Law Stud. Mag. 363, 364). The commissioner grants the certificate; the creditor is heard to oppose the grant; and the Court of Bankruptcy, *i. e.*, the Vice-Chancellor in bankruptcy, confirms it. The commissioner may withhold it entirely, or suspend it for a time (Deacon's Bankr. Pract. 626, 2nd edit.).

XIII. Conveyance by trader not act of bankruptcy.—A trader may assign his effects as a security for or in payment of an antecedent debt without committing an act of bankruptcy, when he does not thereby disable himself from carrying on his trade, and has no intention to prefer a particular creditor, and does the act by legal compulsion (see *Chase v. Goble*, 3 Scott, N. R. 245; *Selw. N. P.* 206, 11th edit.).

XIV. Joint-stock company—Acts of bankruptcy.—The following acts of a joint-stock company will be deemed acts of bankruptcy, namely, 1.—By filing a declaration of its own insolvency. 2. By omitting to pay, secure or compound for a debt due on judgment, decree, or order of court. 3. By omitting (in case of an action brought to recover a debt of such an amount as is requisite to support a fiat and properly verified by affidavit) for one calendar month to enter an appearance, and make it appear to the satisfaction of one of the judges of the court, that it is the intention of the company to defend on the merits (7 & 8 Vict. c. 111, s. 4—7; see also 7 & 8 Vict. c. 113, s. 98).

XV. Reputed ownership.—Property in the bankrupt's possession at the time of the fiat belonging to other parties, with their consent, vests in the assignees (6 Geo. 4, c. 16, s. 72; 6 Law Stud. Mag. 362; First Book, 250).

MOOT POINTS.

No. 39.—*County Court—Commitment—Certificate of Bankrupt.*

A judgment was obtained in the county court of A. against B., for the payment of a debt due to C. Subsequently B. became bankrupt and obtained his certificate.

B. has lately been summoned under the 98th sect. of the County Court Act (9 & 10 Vict. c. 95), and upon his examination it was proved to the satisfaction of the judge, that B. had had, since the judgment was obtained against him, sufficient means and ability to pay the debt and costs according to such judgment, whereupon the judge committed him to prison for forty days.

Looking at sect. 102 of the above act, is B.'s certificate of any avail in preventing his being taken under the warrant of commitment?
G. W.

No. 40.—*Stamps on Transfer.*

A. mortgages his estate to B. in fee for securing £4,000 and interest (the mortgage deed giving B. a power of appointment). By indenture of transfer B. appoints to C. A. joining in the transfer and further mortgaging the estate to C. for securing the further sum of £1,000. The transfer deed contains new proviso and covenants for payment of the whole sum of £5,000 and interest on a different day to that specified by the original mortgage. Your opinion is requested as to the stamps required on the transfer deed. It contains upwards of 30 folios.

Vide 3 Geo. 4, c. 117; Doe d. Bartley v. Gray, 4 Law Journ., N. S., K. B. 197; Lant v. Pearce, 7 Law Journ., N. S., K. B. 135; Humberston v. Jones, 16 Law Journ., N. S., Exch. 293; Doe d. Crawley v. Gutteridge, 17 Law Journ., N. S. Q. B. 99.

T. H. W. (Louth).

No. 41.—*Copyhold—Admission.*

A. devises his copyhold estate to B. upon trust to pay the rents, &c., for the support, &c., of testator's son during his minority, and in case of his death under twenty-one years of age then upon further trusts for sale, &c. If the son attained twenty-one then he expressly devised the estate to his son. The trustees were admitted upon the trusts of the will, and the son has attained the said age of twenty-one years. Is it necessary for the son to be admitted?
E. H.

No. 42.—*New Inclosure Act, 8 & 9 Vict. c. 118.*

By section 84, it is enacted "that if at any time before an allotment shall have been made by the valuer, any person shall sell his right or interest in the land to be inclosed, or any part thereof, to any person; the valuer shall, upon such sale being certified to him in writing, *by the vendor, make an allotment of land to the purchaser, or to his heirs or assigns* in respect of the right or interest so sold; and every such purchaser or his heirs or assigns shall, *from the confirmation of the award, hold and enjoy the land* so to be allotted to him, in such manner as the vendor might or ought to have done in case such sale had not been made.

A. purchased a common right of B. in a parish being inclosed under this act. B. did not execute any conveyance to A., but gave a receipt on stamp for the purchase money, and also gave notice in writing to the valuer of the sale. The valuer allotted to A. accordingly.

Can A. make a good title to a purchaser without a conveyance of the fee from B.
J. W. (St. Ives, Hants.).

No. 43.—*Conveyance to Class of Persons.*

Lands are conveyed by deed to A. for his life, and after his decease to all such of the children of B. as shall attain twenty-five, in fee. B. surviving A., and at the time of the decease of A., two of B.'s children had attained twenty-five, but there were five others living, some of whom afterwards attained the specified age.

1. What is the character of the limitation over; i. e., is it a shifting use, remainder, &c., or is it not void?

2. Does the limitation over give a joint tenancy or a tenancy in common?

3. Who are entitled to take under the limitation over?

4. Is the gift over void for remoteness?

See *Mogg v. Mogg*, 1 Meriv. 654; *Festing v. Allen*, 12 Mees. and W. 279; S. C. 13 Law Journ., N. S., Exch. 74; *Williams v. Teale*, 6 Hare, 239; *Duncannon v. Smith*, 12 Ch. and Fin. 546; S. C. 10 Jur. 621.

NOTE.—This case will well repay attention, and bring out many important doctrines of Real Property Law. The deed is not said to limit uses, but it may be noticed, if there is any distinction arising from that. —Eds.

No. 44.—*Hawker—License.*

Can a hawker, with a £4 license, send his goods from town to town by a public conveyance drawn by horses, without being liable to a horse license under the 50 Geo. 3, c. 41?

If he cannot, then if he send them by a public conveyance drawn by four horses, does it not necessarily follow that he must, for each horse, take out a license of £4, and also have his name and calling in life printed on the coach?

It should be observed as to a license for each horse that the case *Rex v. Robotham*, 3 Bun. 1472, was decided prior to the above act.

If liable for a horse license if his goods be removed as above, can he not send them by rail or canal without such liability? It seems plain that he may, as the act imposes no duty on the party thus sending goods.

Can a hawker use a dog cart drawn by one or more dogs without taking out an increased license? The words of the act are for every horse, ass, or mule, or other beast bearing or drawing burthen, the sum of £4 yearly for each beast. G. W.

No. 45.—*Bankruptcy*—6 Geo. 4, c. 16, s. 127—5 & 6 Vict. c. 122, s. 37.

By the 127 sect. of the 6 Geo. 4, c. 16, it is enacted, that if any person who shall have been discharged by a certificate of conformity, or who shall have compounded with his creditors, or have been discharged by any insolvent act, shall be, or become, bankrupt, and have obtained, or shall thereafter obtain such certificate as aforesaid, unless his estate should produce (after all charges), sufficient to pay every creditor under the commission, *fifteen shillings in the pound; such certificate should only protect his person from imprisonment; but his future estate and effects (except, &c.), should vest in the assignees under the said commission.*

The 37th sect. of the 5 & 6 Vict. discharges every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force at the time of issuing the fiat against him, *from all debts and demands due by him when he became bankrupt, and from all claims and demands made provable under the fiat; in case he shall obtain a certificate of conformity as therein mentioned, and subject to the provisions thereafter contained; but does not particularly mention any person who has been bankrupt more than once.*

Would A., who has been bankrupt twice, and obtained his certificate, but paid under each bankruptcy *only ten shillings in the pound*, be capable of acquiring and retaining property against his assignees? Or is the 127th section of the 6 Geo. 4, still in operation?

D. B.—, M.

ANSWERS TO MOOT POINTS.

No. 15.—*Will—Lapse of Gift, &c.* (No. 3, N. S., p. 48).

With reference to this Moot Point, as a residuary bequest of personal estate carries not only every thing not disposed of, *but every thing that in the event turns out not to be disposed of* (Worth. on Wills, p. 454), and presuming that the testator made no gift over of the shares respectively given to D. E. and F. ; D.'s share upon his death lapsed into the residue, and B., upon the testator's death, became entitled thereto as residuary legatee—had the gift been made to D. E. and F., as *joint tenants*, no lapse would have taken place, but the survivors would have become entitled to D.'s share (Byth. Conv. vol. x., p. 93). It may also perhaps be as well to observe that since the new Wills Act (1 Vict. c. 26) came into operation (1st January, 1838), a residuary devisee of real estate would be entitled to any lapsed devise of real property in exclusion of the heir-at-law, who, prior to that time, took all *lapsed* devises, thus making the above rule applicable as well to *real* as to *personal* property.

J. BEAUMONT (Witham).

No. 16.—*Transfer of Mortgage—Stamp* (vol. i., N. S., pp. 43; 79):

(Continuation Answer).

In *Doe dem. Bartley v. Gray*, it was decided that when an *ad valorem* duty was paid on a further advance no transfer stamp is needed, and it might be argued that in this case that the deed stamp would as it were stand in the place of the *ad valorem*, and have the same effect, and that no transfer stamp would be wanted; and, indeed, the 3rd sect. of the 3 Geo. 4, c. 117, says that "such deed shall be charged only with the ordinary duty payable on deeds in general;" but as there has been no decision on this point, and as Lord Denman, in his judgment, in *Doe dem. Bartley v. Gray*, gives no reason why the court was of opinion that under the act, no transfer duty was necessary, I think it would be safer to have the deed stamped with both the transfer and the deed stamp.

T. H. W. (Louth).

NOTE.—It seems to us that a transfer stamp is requisite, as well as a deed stamp. Sect. 3 of the 3 Geo. 4, c. 117, appears to apply only to the case of a further security *between the same parties*, and does not affect the stamp required on a transfer, which is provided for by s. 2. This construction would be consistent with the language of the statute, and would introduce a convenient and sensible course of

practice—which, at present, from the decisions, does not seem likely to be obtainable. We see Mr. Tilsley, in his useful work on the “Stamp Laws” (p. 486), lays down the following propositions as the result of the decisions:—

I. *Transfer with further advance*.—A transfer of mortgage where a further sum is advanced is liable only to an *ad valorem* duty on the further sum and progressive duties of 20s. each (this sets at rest the doubt expressed in 5 Jarman’s Convey. 540, which, indeed, is cleared up at p. 542).

II. *Transfer with further security*.—A transfer of mortgage where a further security is given for the original sum, either by the addition of other property, or by an enlarged estate in that originally mortgaged, is chargeable with a common deed duty of £1 15s. in respect of the further security, in addition to the transfer stamp of the same amount, and progressive duties of 25s.

III. *Further advance and further security*.—Where a further sum is advanced, whether on the occasion of a transfer or not, and additional security is given as in the last proposition, the proper stamps will be, the *ad valorem* duty on the further sum, and a common deed duty of £1 15s. in respect of the additional security, with progressive duties of 20s.

We consider the additional covenant as a “further security,” so as to bring the case within the second of the above propositions.
—*Eds.*

Since the above was written, we perceive that Mr. Justice Wightman is reported (12 Jur. 52) to have said that s. 3 of 3 Geo. 4, c. 117, applies only to a deed “between the original parties,” which supplies an unexpected confirmation of what we have above stated.

No. 21.—*Dower—Conveyance* (No. 4, N. S., p. 57).

If the wife of C. D. being dowable of the estate devised to him, joined (with due acknowledgment of the deed) in the mortgage in fee thereof, she would of course be completely barred of her dower as affects the mortgagee and those claiming through him, and I apprehend no right of dower would attach to the estate of the husband, which would then be reduced to an *equity of redemption* (see answer to No. 22, where that point is more fully dwelt upon), and it would follow that the re-conveyance of the estate to uses to bar dower would prevent the revival of the right to dower, and that the wife need not be a party to a conveyance of the estate by the husband to a purchaser. I presume that the reconveyance was, as regards the uses, consistent with the proviso for redemption contained in the mortgage—which proviso would be in the form—not of a condition to vacate on payment—but of an agreement for reconveyance to such

uses as the mortgagor should direct—the estate being the husband's, not the wife's.
P. W.

No. 22.—*Dower (in Equity of Redemption)* (No. 4, N. S., p. 57).

In case of a common mortgage as soon as the day of payment is past, the legal estate is absolutely vested in the mortgagee, and a right of redemption only remains in equity (*Marks v. Marks*, 10 Mod. 424), and there is no dower of an equity of redemption (2 Saund. Rep. 46, n. [p.]), and although it has been decided that the equity is an estate in land (*Casborne v. Scarfe*, 1 Atk. 602; *Casburn v. Ingliss*, C. T. Hardwick, 399), yet a bill by a widow for dower of an equity of redemption was, after full argument, dismissed (*Dixon v. Saville*, 1 B. C. C. 326). The arguments relied on in that case, in support of the widow's claim, seem to have been that dower was a right founded on principles of morality and equity, and that an equity of redemption was founded on the principle that the mortgage was but a pledge, and the original ownership remained in the mortgagor, subject to the legal title of the mortgagee so far as such legal title was requisite to the end of his security—his beneficial interest, although the mortgage was in fee, being considered only as personal estate (*Pow. Mort.* 726, 4th ed.). It is true in the case of *Banks v. Sutton* (2 Pr. Wms. 700), it was decided that the husband being entitled to redeem an outstanding mortgage, the same right was conferred on the widow, and her dower was decreed to her—she allowing a third of the interest of the mortgage money, but in that case the circumstances were peculiar—a marriage settlement being involved, and the husband having been deemed in default in performance of some act necessarily devolving on him, by reason of which default the widow was prejudiced. The decision, therefore, has subsequently had no effect on the main question; indeed, it was afterwards expressly overruled in *Dixon v. Saville*, *supra* (Sugd. Vend. and Purch. Appx.; *Coots on Mort.* 50). And as to the practice of conveyancers, Mr. Barton, in his *Precedents* (vol. iv., 291), has this note on the point, “An Equity of Redemption of a Mortgage in Fee, is not liable to dower; the wife of the mortgagor need not, therefore, be a party (to a mortgage of the equity of redemption).”
P. W.

NOTE.—We presume that our correspondent does not attach any importance to the opinion which some conveyancers entertain that sect. 14 restricting the operation of the act to the dower of widows married after the 1st of January, 1834, does not apply to sect. 2, which gives the widow dower out of equitable estates. They say that this section (as also sect. 3) *extends* the widow's right, and that the restrictive clause only applies to those sections which *curtail* her rights (see *Hayes' Convey.* 273, 4th edit.).

No. 23.—*Intestacy* (No. 4, N. S., p. 56).

Where some of the intestate's children are living, and some dead, and such as are dead have each of them left children, in this case the children of the deceased children take *per stirpes* (Williams', Executors and Administrators, 3rd edit., vol. ii., p. 1182). I cannot see that the husband of a deceased daughter who died in an intestate's lifetime has a shadow of title to the share to which such daughter would have been entitled had she survived her father. The husband's common law right reserved by the 29 Car. 2, c. 3, s. 25, which provides that neither the statute of distributions, or anything therein contained, "shall be construed to extend to the estates of *femes covert*s that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said act;" would not, I think, in the least affect the children's right of representation in the above case.

J. BEAUMONT (Witham).

EASTER TERM EXAMINATION ANSWERS.

The Questions at the Examination in Easter Term, 1849, will be found in another part of this number.

The result of the Examination was that nine were rejected. The numbers actually examined were 94, and of those passed, 85.

In other words, about one in ten were turned back, which is a very large proportion, though probably not so large as some future examinations will present.

It is to be noted that the questions in equity are very difficult, involving as many of them do points of pleading—in fact just those points which are not to be found in the more popular works on equity practice, namely, Smith's Handbook and Ayckbourn's Practice. It is with a view to meet these questions that we have made our work on "*Equity Practice*" embrace the subjects of parties to suits, pleading, evidence, &c. Let any one try to answer several of the questions from either Smith or Ayckbourn, and he will fail to find answers to them. Indeed, two or three of the questions have given us great trouble in answering, and it is pretty plain that the articulated clerk is required to know something more than mere practical details.

We cannot help observing (though it is only repetition of previous remarks) that it is very foolish for gentlemen to go up to the examinations without previously testing their knowledge, particularly as this may be done so easily by means of the Questions and Answers.

EASTER TERM EXAMINATION ANSWERS.

[Concluded from Supp. p. 89.]

CONVEYANCING (vol. 1, N. S., p. 148).

I. *Largest estate conveyed*.—The largest estate or interest in land that can be conveyed by one person to another is a fee simple absolute; for that is the largest estate a man can have (Littleton, s. 11; 2 Black. Com. 106).

II. *Conveyances*.—The present modes of conveyance for passing away freehold lands are feoffment, grant, lease and release, bargain and sale, and covenant to stand seised to uses, &c. As under the 8 & 9 Vict. c. 106, s. 2, the immediate freehold of corporeal hereditaments lies as well in grant as in livery, it is probable that in a few years the grant will become the universal conveyance. But at present this is by no means the case.

III. *Copyholds—Conveyance*.—Copyholds can only be conveyed by a surrender followed by an admittance. This is well explained in Littleton, s. 74 (see 16 Law Journ., N. S., Q. B. 110). Equitable interests in copyholds may, indeed, pass by an ordinary deed (note to Litt. s. 74).

IV. *Estate tail male*.—If lands are conveyed (to X. and his heirs) to the use of A. and the heirs male of his body; A. takes an estate tail male general executed in him by the statute of uses (2 Bart. Convey. 60, 61; 1 Steph. Com. 235, 2nd edit.).

V. *Barring entail*.—A tenant in tail may convert his estate into a fee, by an *actual conveyance* duly enrolled in Chancery within six calendar months. But in the case of a tenant in tail under a settlement the consent of the owner of the first estate of freehold (or for years determinable on life or lives), created by the *same* settlement, is requisite, otherwise the issue only will be barred, and base fee only passes by the conveyance (see First Book, pp. 216, 217; 1 Steph. Com. ch. 19, pp. 548, 549, 2nd edit.).

VI. *Trust or legal estate*.—If land is conveyed to the use of A. and B. and their heirs, they would take a legal estate as joint tenants in fee. Supposing the conveyance to have been to A. and B. and their heirs to the use of them and their heirs, they would be in at the common law, and not by the statute of uses (see 2 Law Stud. Mag. 39; Doe v. Passingham, 6 Barn. and Cres. 305; S. C. 9 Dowl. and Ryl. 416). Supposing the conveyance to be to X. and his heirs to the use of A. and B. and their heirs, still A. and B. would

take a legal estate, but in this case they would take it under the statute of uses (see 2 Law Stud. Mag. 37—40, at which latter page is an explanation of the limitation (which is seldom understood) “unto the use” of a party). A limitation may be to two and their heirs, and they will be joint-tenants; the heirs of the survivor only taking (see Litt. s. 277, and Lord Coke’s explanation; 3 Bart. Convey. 447, 448).

VII. *Tenancy in common*.—If it be required to pass land by deed to A., B., and C., as tenants in common in fee, in the operative part of the deed there should be the words “to have and to hold one undivided third part or share to A. and his heirs, another undivided third part or share to B. and his heirs, and the remaining undivided third part or share to C. and his heirs..” This is so expressly stated by Littleton, s. 298. This is the proper technical form, but the estate might be, and very frequently is (except where uses are declared) limited to the grantees “to hold as tenants in common and not as joint-tenants,” though the latter words are not necessary (see 2 Bl. Com. 193; 3 Bart. Convey. 414, 422). The difference formerly taken between a conveyance at common law and one operating under the statute of uses is not now recognised (see 4 Bac. Abr. 467, 7th edit.; Sugd. Gilb. Uses, 144; Noy’s Max. by Byth. 84. As to surrenders of copyholds, see Fisher v. Wigg, 1 Salk. 391; Rigden v. Vallier, 2 Ves. 256).

VIII. *Covenants for title*.—The vendor covenants usually—1. That he is seised in fee. 2. That he has power to convey. 3. For quiet enjoyment by the purchaser, his heirs, and assigns. 4. That the estate is free from incumbrances. 5. For further assurance. The first may be omitted, as being synonymous with the second (Corn. Purch. 44).

IX. *Execution of will*.—A will should be in writing (except as to personal estate of soldiers on actual service, or seamen at sea), be signed at the foot or end thereof (1 Law Stud. Mag., N. S., 166), in the presence of two witnesses at the same time, which witnesses must attest and subscribe the will in the presence of the testator (see 7 Jur. 205).

X. *Distribution of personalty*.—The mother will take one third, the brother of the deceased another third, and the two children of the deceased brother the remaining third between them. This is under the 1 Jac. 2, c. 17, for under the 29 Chas. 2, c. 3, the mother would have taken all.

XI. *Distribution of personalty*.—If the only relations of an intestate (there being no wife) be a deceased brother’s daughter, and two grandchildren of a deceased sister, the former will take the whole; for no representatives are admitted among collaterals, further than the children of the intestate’s brothers and sisters (J. P. Will.

25, 27; Lord Raymond, 571; 2 Blackstone's Com. 517, n. 24 by Christian).

XII. *Sale of lease—Showing lessor's title.*—A person selling a leasehold estate but unable to produce the original lessor's title, should provide in the conditions of sale that he shall not be bound to give any earlier title than the original lease, and shall not be required to show or be answerable for his lessor's title, &c. (see 6 Law Stud. Mag. 299).

XIII. *Registration of lease.*—The registration of an assignment of a lease, even though it recite the original lease, will not cure the want of the registration of such lease (*Honeycomb v. Waldron*, 2 Stra. 1064).

XIV. *Application of purchase-money.*—A purchaser of an estate sold subject to a trust for payment of debts *generally*, is *not* bound to see to the application of the purchase-money, unless he has notice that there are no debts or of fraud. The reason of the rule is that it would be impossible for a purchaser, under such a general charge, to ascertain the sums to which the property is liable without a suit, which it would be unreasonable to require him to institute. The rule relieving the purchaser has reference to the death of the testator, and does not cease to be applicable though the debts be *subsequently* paid, but it does not apply where there is notice that there were in fact no debts at the death. See Princ. Eq. 326—330, where this important subject with its nice distinctions is fully stated.

XV. *Inadequacy of consideration.*—Mere inadequacy of consideration for a purchase of lands would not, though it were considerable, be a ground for impeaching the purchase. The inadequacy must be *such* as Lord Eldon (*Astley v. Weldon*, 2 Bos. and Pull. 351), "so gross that a man would stare at it," or as he elsewhere said (*Coles v. Trecothick*, 9 Ves. 246), "the inadequacy must be such as shocks the conscience." See Princ. Eq. 45—48, where the cases and distinctions are collected. The above does not apply where the purchase is from persons standing in a peculiar position to the purchaser, or objects of peculiar favour in equity, as to which see Princ. Eq. 75—85, also 1 Law Stud. Mag., N. S., 21, 22.

CRIMINAL LAW (vol. 1, N. S. 148, 149).

I.—*Offences.*—Offences, or crimes, are usually divided into two classes—1. Misdemeanors. 2. Felonies. Treason is included under the term "felonies." We may here observe that "crimes" and "offences" may be considered as synonymous. Mr. Warren (*Law Studies*, 589, 2nd edit.) after noticing the misuse of the words "crimes and misdemeanors" (3 Bl. Com. 2), says: "A crime is an offence; and offences consist of felonies and misdemeanors;" he says that the title of Mr. Russell's work "On Crimes and Misdemeanors" is erroneous, for the former word includes the latter.

II. *Forfeiture*.—In misdemeanors there is no forfeiture of property, except in some particular cases where the statute expressly provides for the forfeiture of the specific property. In felony (not here including treason) the offender forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life. And in felony for murder, the offender, in addition, forfeits all his fee-simple estates after his death to the Crown for a year and a day. In the particular species of felony denominated *treason*, the offender forfeits all his freeholds of inheritance to the Crown (see First Book, 441, 442).

III. *Homicide*.—Homicide is the general term for any manner of killing of a human being. Homicide is either justifiable, excusable, or felonious. Justifiable is where an officer kills an offender in the execution of his office, or of process, when resisted. Homicide is excusable where done in necessary self-defence, or where the death is caused by a lawful act without negligence. Felonious homicide includes murder (also self-murder) and manslaughter. Both these killings are unlawful, but murder is done with malice prepense, whilst manslaughter is without malice (First Book, 384—387; 4 Steph. Com. chap. 4, p. 120—154, 2nd edit.).

IV. *Undergoing punishment*.—By 9 Geo. 4, c. 32 (see also 6 Geo. 4, c. 25; Watk. Convey. 477; 7 & 8 Geo. 4, c. 28, s. 13), the enduring the punishment for an offence not capital enables the party to have and retain property acquired subsequently to the expiration of the punishment; for the enduring the punishment has the same effect and consequences as a pardon.

V. *Amending indictment*.—By sect. 4 of 11 & 12 Vict. c. 46, any court of oyer and terminer, and general gaol delivery, may cause the indictment or information for any offence whatever, when any variance shall appear between any matter in writing or print produced in evidence, and the setting forth thereof upon the record, to be forthwith amended in such particular, and thereupon the trial shall proceed as if no such variance had appeared.

VI. *Criminal appeals*.—Questions of law in criminal cases may be submitted to the consideration of the judges at Westminster by a special case which is to be signed by the judge trying the case, and transmitted to the court above. This was formerly done on trials before judges of assize, but not at sessions, but now a case may be stated from any criminal court. This is by the late act, 11 & 12 Vict. c. 78, stated 1 Law Stud. Mag., N. S., 13; see also pp. 16, 17, 102).

VII. *Ex officio information*.—An ex officio information is exhibited in the name of the sovereign for misdemeanors tending to disturb or endanger the Government. It is filed by the Attorney-General on the Crown side of the Court of Queen's Bench (Com.

Dig. tit. "Information;" 4 Steph. Com. 409, 2nd edit.]. The information is not submitted to a grand jury before it is found (1 Chitt. Crim. Law, 842, 2nd edit.; 4 Black. Com. 309; Bacon's Abr. tit. "Information," A.).

VIII. *Criminal information*.—A criminal information is filed on the complaint of any subject for any gross misdemeanor, riot, libel, challenge to fight, &c.; also against magistrates for gross misbehaviour in their office. Leave to file the information must be obtained by a rule to show cause in the Queen's Bench. The information is afterwards filed in the Crown-office of the Court of Queen's Bench (4 Steph. Com. 409, 410; Bacon's Abr. tit. "Information").

IX. *Perjury, effect of conviction*.—A conviction for perjury prevents a man from acting as a juror (if challenged), and so formerly it did from being a witness, but now by the 6 & 7 Vict. c. 85, a party convicted of perjury may be a witness, and the objection will only go to his *credit* (3 Steph. Com. 583; 4 *Id.* 294, n. b., 298, n. d.).

X. *Evidence*.—Where several persons are indicted, and at the close of the prosecutor's case, it appears that there is no evidence against one of them, the counsel of such prisoner should apply for his acquittal, which will be ordered, and then he may be examined on behalf of the other prisoners (see 1 Chitt. Crim. Law, 626a, 2nd edit.; Rep. t. Hardw. 123, 264; 1 Archb. Just. Peace, 2nd edit.).

XI. *Witnesses on back of indictment*.—The judges have laid down a rule that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment; but the prosecutor ought to have all such witnesses in court, so that they may be called for the defence, if they are wanted for that purpose; if, however, they are called for the defence, the prisoner makes them his own witnesses (Reg. v. Woodhead, 2 Car. and K. 520; see as to former practice, Bodle's case, 6 Car. and P. 186; Harris's case, 7 Car. and P. 581; Roscoe's Crim. Evid. 150, 151, 2nd edit.).

XII. *Bastardy evidence*.—The oath of the mother of an illegitimate child is not of itself sufficient to charge a person as the putative father, but she must be corroborated in some material particular (1 Archb. Just. Peace, 159; 2 Law Stud. Mag. 56, 161; 3 *Id.* 7; 5 *Id.* 83, 84; see 1 Law Stud. Mag., N. S., Abr. Magist. Cas. 2, 3).

XIII. *Promissory note for support of bastard*.—Independently of the late act whereby the money for the support of a bastard is to be made payable to the mother and not to the parish officers, the parish officers could not sue upon a note given to them for payment of a sum of money for the maintenance of the child, for the 6 Geo. 2, c. 31, only enabled the parish officers to take security from the putative

father by way of *indemnity*, and they should therefore have taken a bond of indemnity (*Cole v. Gower*, 6 East, 111; 1 Chitty's Bills, 711; *Overseers of St. Martin v. Warren*, 1 Barn. and Ald. 491).

XIV. *Costs*.—The court has power to allow the costs of a prosecution in almost every felony and in several misdemeanors (see *ante*, p. 53, *answ.* xv.).

XV. *Costs of not proceeding to trial*.—On an information for a misdemeanor, if the prosecutor does not proceed to trial according to his notice, not having countermanded it in due time, the costs must, by the course of the court, be paid to the defendant, unless the defendant has by his conduct misled the prosecutor (see 1 Chitty's Crim. Law, 870, 2nd edit.; 3 Burr. 1304).

CORRESPONDENCE.

Testing Reading—Questions on Law Books.

GENTLEMEN,—Various methods, such as books of questions, &c., have been suggested as a means whereby the student may test his amount of knowledge previous to presenting himself for examination, and all of which have, to a certain extent, the desired effect. But it is obvious that, in a book containing only a series of general questions, there are many points that are never mentioned or noticed at all, and also many questions upon which the student has not met with any explanation; it is, therefore, to remedy the first inconvenience that I have sought for some plan; and I have succeeded. I will, therefore, with your permission, make it known to my fellow-students.

Having, for example, read the 3rd vol. of *Step. New Com.* (1st edit.), I was desirous to ascertain whether I had profited by its perusal; and the means I employed to ascertain that fact were as simple as I found them beneficial. I turned to the index (of which there is a separate one to each volume), and the first subject that met my notice was "*Abatement of Nuisance*, 360." I then put to myself the following questions: "1st, what is a nuisance? 2nd, how may it be abated?" Having then answered these questions from memory, I passed on to the next subject, and in due course came to "*Actions, possessory and droitural*, 486." Not having a clear remembrance of the distinction between these actions I referred to p. 486, and read again that passage giving me the necessary information, and thus I passed to every subject contained in the index until I might fairly presume I had gained a knowledge of the principal

matters contained in the volume; and this plan I have adopted with every book I have read.

Perhaps you may think, and many students may think with you, that this plan is open to objections, or it may savour a little of the *cramming system* which many gentlemen (and I am personally acquainted with some) regret for many years; for although they may pass by accident through the examiners' hands, they know their inability to undertake a responsible situation in an office, and consequently have yet to make good their requisite amount of legal knowledge by a kind of second clerkship. But I think by the adoption of the plan I have suggested many students would not lay aside a book because they have read it, as by testing their memory they would find they had not a clear remembrance of many points, and would, therefore, re-read the same volume rather than take up another; and I may say it is especially upon this point that it has its advantage.

I trust you will find a space for this hint in the pages of your *MAGAZINE*, and that if you approve of the suggestion you will add such advice to your readers for its adoption as may seem to you expedient or necessary to complete an explanation which I have endeavoured to give in the smallest space.

I am, &c.,

A CANDIDATE FOR THE NEXT EXAMINATION.

MOOT POINTS.

No. 46.—*Copyholds—Admissions.*

A. is possessed of an undivided moiety of a moiety of a copyhold estate held of the manor of T. B. is also possessed of a moiety of a moiety of the same estate. C. is possessed of the other entire moiety of the said estate, and by her will, duly attested, devises to her two nieces the above-named A. and B. her above-named moiety, "to hold the same to the said A. and B., their heirs and assigns for ever, as tenants in common, and not as joint tenants." Shortly after C. had made her will, and in her lifetime, B. dies seised of her moiety of a moiety, but intestate; and said A., being heiress-at-law of the said B., claims, as such, to be admitted to her (B.'s) moiety of a moiety. Before, however, A. has taken admittance to the moiety of a moiety of B., C. dies, without having in any way altered or revoked her said will so far as related to the above devise, and the will was subsequently duly proved. Now, on A. going to the court to be admitted, the steward claims the right of *three* admissions; the

one as heiress-at-law of B., for her moiety of a moiety (of which there can be no doubt); another, to the moiety of a moiety derived to the said B., under the will of the said C., (A. being heiress-at-law of B. as before stated); and a third for the moiety of a moiety derived to her the said A., under the will of the said C.. Now, the said A. being heiress-at-law of the said C. as well as of said B. cannot she claim to be admitted on her superior title of heiress-at-law, to the whole moiety of which A. died seised, leaving out her claim as devisee altogether, and thereby make two admissions with two sets of fees suffice? Or can the steward enforce three admissions as above stated? Lastly, in the event of one admission being taken to the entire moiety of C. what stamp would be required?

C. W. (Witham).

No. 47.—*Incorporeal Right—Window.*

During the last fifty years, A. has been in the occupation of premises belonging to B., held either under a lease or a mere parol tenancy; he has also occupied during that period, or some part of it (more than twenty years), premises adjoining which belonged to him, during some part of which respective occupancies (though more than twenty years ago), he opened a window looking from his into B.'s premises.

Can B. now close it without being liable to an action? i.e., can a party gain a right over premises of which he is a tenant?

Early communications on this point would oblige,

HENRY HUGHES (High-street, Maidstone).

No. 48.—*Power of Appointment—Exercise of by Married Women.*

A sum of money is vested in trustees in trust to pay the interest to B. A. (then a feme sole) for her life, and after her decease, in trust, to pay the principal to such persons as she the said B. A. shall by a deed or will appoint, and in default of appointment, to B. A.'s next of kin. B. A. afterwards married. In the deed creating the above trust there is not any clause for separate use, or restraining alienation by B. A., nor are there in the clause giving the power of appointment any words dispensing with the disability of coverture. Can B. A., without the concurrence of her husband, dispose of the fund now as against the next of kin?

No. 49.—*Landlord—Assignment for Benefit of Creditors—Claim.*

A. B. being tenant from year to year of a messuage under an agreement (by letter) between landlord and himself, that twelve months' notice prior to November in any year should be given on either side to quit possession, in January 1849, A. B. assigned by deed all his property whatsoever to trustees for the benefit of his

creditors. The trustees immediately take possession of A. B.'s stock, household effects, &c., and from time to time sell the same upon the premises, and also pay the poor-rates, &c., in respect of the premises.

Has the landlord any, and what claim upon the trustees?

W. N. jun. (Retford).

ANSWERS TO MOOT POINTS.

No. 2.—*Devise* (No. 2, N. S., p. 27).

Where a charge is made on a devise of real estate for payment of the testator's debts, I apprehend a fee *would* pass to the devisee. If no charge was imposed under the will, then of course it would be *contradictory* (that is), previous to the passing of the 1 Vict. c. 26.

It is not stated in the question whether the devisee took a *residuary* devise or not. If so, the case below quoted would apply, and even supposing he did not, I am nevertheless of opinion that he *would* still take a fee. In *Dover v. Gregory*, 9 Law Journ. Rep., N. S., Ch. 81 [S. C. 10 Sim. 393], where a direction by the testator that all his debts and funeral expenses, and the charge of proving his will should be fully discharged by his executor after named, followed by a devise of his copyhold estates to his son, *without words of inheritance*, and the appointment of his son as his sole executor and residuary legatee, it was held that the debts were charged upon the devise, and that he took the fee in the copyholds.

The fact of the devisee being appointed sole executor of testator's will, would not I think prejudice the opinion first stated; for the Vice-Chancellor in his judgment gave it as his opinion a fee would pass, although it may be to a stranger. *Vide* judgment.

C. G.

Notes.—The question is, whether the language of the will makes the debts a charge on the devisee (or, which is the same, on the estate which he takes), or on the estate generally in whosoever hands it may be. If the latter be the meaning then B. took an estate for life only; if the former, then he took in fee (see *Doe v. Sams v. Garlick*, 15 Law Journ., N. S., Exch. 54; and the judgment of Parke, B., stated in 5 Law Stud. Mag. 4, 5). It seems to us that the devisee was to have the estate only in case he discharged the debts, and that, therefore, he took a fee.—Ers.

No. 43.—*Conveyance to Class of Persons* (No. 6, N. S., p. 91).

I have considered this Moot Point and would beg to submit the following as the conclusions to which I have arrived:—

1st. The limitation over after the death of A., to all such of the children of B. as shall attain 25 in fee is not a shifting use; as it has been resolved that wherever there was a preceding estate capable of supporting a subsequent contingent limitation, it should be construed to be a contingent remainder, and not a springing or shifting use (Craze's Digest, vol. ii, p. 360); but it appears to me to be a *contingent* remainder, which, upon any one of the children of B. attaining twenty-one years of age, would become a *vested* remainder in such child, which would divest as to the proportions of any other child or children afterwards becoming capable before the determination of the life estate of A. (Ferne Cont. Remrs. 812).

2nd. I am inclined to think the parties would take as *tenants in common*; Blackstone says that a joint tenancy is distinguished by unity of title, unity of interest, unity of time, and unity of possession; and speaking of unity of time, he says, "the estates must be vested at one and the same period, as well as by one and the same title; as if after a lease for life the remainder be limited to the heirs of A. and B., and during the continuance of the particular estate, A. dies, which vests the remainder of one moiety in his heir, and then B. dies, whereby the other moiety becomes vested in the heir of B.; now A.'s heir and B.'s heir are *not joint tenants* of this remainder, but tenants in common, for one moiety vested at one time, and the other moiety vested at another" (2 Black. Com. chap. 12, sub. Joint Tenancy). But this doctrine seems to be confined to limitations at common law and not to extend to estates raised by *way of use*, or *by devise*; for where a conveyance was to the use of A. the husband for life, remainder to the use of B., the wife, for life, remainder to the uses of all the issues female of their two bodies, and the heirs of the bodies of such issues female; A. and B. had issue a daughter; and it was resolved that the remainder in tail to the issues female was not so attached in that daughter, as not to be divested for a moiety on the birth of another daughter, and Holt, J., held that the daughters were *joint tenants* of the freehold and tenants in common of the inheritance; he said that the case put in Coke upon Littleton of a feoffment to the use of the feoffor for life, and of such wife as he should afterwards marry, that on their subsequent marriage, he and the wife were *joint tenants*, ruled the case before him; for it was a *joint claim* by the same conveyance which he said made joint tenants, and not the time of vesting, and he seemed to deny a case similar to the one quoted from Blackstone as to the heirs of A. and B. taking as tenants in common (Ferne Cont. Remrs. 313). Blackstone, however, alludes to the case which guided Holt, J. in his decision, but it will be observed that that was a limitation *by way of use*, and therefore cannot be taken in opposition to the authorities in Coke Litt. 188a, and Black. *supra*.

3rd. I think that the two children who had attained twenty-five years of age at the death of the tenant for life, are the parties entitled to take under this limitation over; and this view of the case appears to be supported by the decision in *Mogg v. Mogg*, 1 Meriv. 654, in arguing which counsel said, that "so long as an estate remains an estate *in futuro* it might open, but not after it had taken effect, or become vested in possession," an opinion in which the court appears to have coincided as to all such property as was given by way of remainder; and the case of *Festing v. Allen*, supports the doctrine of excluding any who may become capable after the determination of the preceding estate, as in that case an estate was given to trustees to the use of M. for life, remainder to the use of all and every the child or children of her the said M. who should attain the age of twenty-one years; at her death M. left three children all under twenty-one years of age, and the Court of Exchequer held that no child having attained the age of twenty-one years at her death, the remainders were divested, and the children took no interest in the estate devised (13 Law Journ., N. S., Exch. 74).

4th. Of course from what has been previously said it will be seen that I do not consider the remainder void; in *Mogg v. Mogg* (*supra*), counsel stated that it was well known that in conveyances created by livery, no one could take who was not *in esse* at the time of the livery; but this observation does not seem to apply to the case of a contingent remainder limited upon a *freehold*, for although no interval is admitted between the determination of the particular estate and the vesting of the remainder, yet a remainder may be so limited as not to vest until the very instant the particular estate determines (*Fearn's Cont. Remrs.* 316).

I need scarcely add that I shall be happy to have the opinion of some of your other correspondents upon the interesting points of real property law involved in this question, whether in support of or against the views taken by me.

J. BRAYMONT (Witham).

NOTE.—We have given early insertion to the above answer, as the evident care bestowed on it deserves that it should be placed before our readers at the earliest opportunity. If we do not shortly receive some communication on this answer, we shall make one or two observations upon it ourselves.—END.

TRINITY TERM EXAMINATION ANSWERS.

[1849.]

In our last number, when speaking of the result of the Easter Term Examination (p. 96), we mentioned the large proportion (one in ten) of the rejected, at the same time intimating that even this large percentage would probably be much increased at some future examinations. And our prediction has been very speedily verified, and to an extent that we could not have expected. At the examination for last term ninety candidates presented themselves for examination, and out of this number no less than *twenty* were *rejected*. This is a fearfully large proportion, and will doubtless carry dismay among those who have shortly to undergo the ordeal.

The fact is, as we have often stated, that articled clerks go up to the examination merely because they have completed the term of their service, and without the least reference to their fitness for passing through such an ordeal, or without once testing the extent of their learning. The consequence has been, what indeed might have been expected at even an earlier period, that the examiners observing this want of preparation in the candidates, have at length determined to make an example which should *compel* future applicants to bear in mind that *some* degree of knowledge is *requisite* to pass through the examination. We know of no better plan for the articled clerk, than that of *testing* his knowledge by the *Examination Questions*. If he finds that he can answer three-fourths of *four* or *five* different sets of questions, he may consider he has a fair chance of success, but if he cannot do this, it is foolish in the extreme to risk an examination. This mode of testing himself is so obvious and needless that it is quite astonishing that every articled clerk does not adopt it.

One thing is quite clear, namely, that it will not do for articled clerks to go up to the examination with only the *average stock* of legal learning hitherto possessed. There must be much more previous preparation, much more steady and systematic reading. The examination must be looked at as a much more serious affair than it has hitherto been.

It will be seen that the questions in *Equity* are very difficult—requiring a knowledge of equity pleading *not* to be obtained from Ayckbourn's or Smith's Handbook. The *Criminal Law Questions*, too, will be found very trying, particularly in requiring an acquaintance with evidence.

COMMON LAW.

I. *Commencing action*.—The usual, and indeed the only mode of commencing a *personal* action is by writ of summons (Pract. Com. Law, 65; First Book, 298). The mixed action of ejectment is commenced by delivery of a declaration (First Book, 288; Pract. Com. Law, 421; Princ. Com. Law, 12). The action of *replevin* is commenced in the new county courts (First Book, 284; Pract. Com. Law, 417; 1 Law Stud. Mag., N. S., 149, 150).

II. *Declaring*.—The next step a plaintiff takes after service of writ is to search if defendants have appeared, and if not, to appear *sec. stat.* for them (Pract. Com. Law, 79), but the examiners evidently allude to the plaintiff's declaring as being the next step. Before declaring, care should be taken that all the defendants, or at least such of them as the plaintiff declares against, be in court (Pract. Com. Law, 78, 135, 136).

III. *Distringas to compel appearance*.—If the defendant cannot be personally (Pract. Com. Law, 74) served, the plaintiff may proceed to sue out an alias writ, and enter original writ on a roll, and so on with subsequent writs and returns until service is effected (see Pract. Com. Law, 356, 357; First Book, 308), or, more speedily, he may apply to the court, or, more usually, a judge at chambers, for a *distringas* to compel appearance, or to proceed to outlawry (see 6 Law Stud. Mag. 494, 495). The application is supported by an affidavit stating the attempts to serve the writ, and that the deponent believes the defendant is keeping out of the way to avoid service (see Pract. Com. Law, 84, 85).

IV. *Arresting defendant*.—If the defendant is going out of the jurisdiction of the court, the plaintiff may apply to a *judge* for a *capias*. An affidavit should be made showing a good cause of action to the amount of £20, and the circumstances leading to the belief that the defendant is about to quit England, and it should be added that the defendant will, it is verily believed, "quit England unless he be forthwith apprehended" (Pract. Com. Law, 88—94; First Book, 303).

V. *Venus*.—This word is derived from *vicinetum* or *vicinia*, signifying a place or neighbourhood, and it was used in the jury process to summon the jury *à vicineto*, i. e., from the place or neighbourhood where the cause of action arose (Holthouse, 424). But the jury now comes from the body of the county mentioned in the margin of the declaration, which, therefore, is now called the venue (First Book, 305; Pract. Com. Law, 136). When the action is local, the venue must be laid in the county where the cause of action accrued; but when it is transitory, the plaintiff may lay it anywhere (*Ibid.*).

VI. *Changing venue.*—When the cause of action is local the defendant cannot change the venue, unless under very special circumstances (Pract. Com. Law, 149—154); where it is transitory, the defendant may change it on the ordinary affidavit, except the action be on a specialty, award, bill, or note (Pract. Com. Law, 150). The venue is changed on a hand motion of counsel, except where it is changed on special grounds, when there must be a rule to show cause (Pract. Com. Law, 153, 154).

VII. *Final and interlocutory judgment.*—In debt, except where breaches are assigned (Princ. Com. Law, 135—137), the judgment by default is final, whilst in assumpsit the judgment is interlocutory only in the first instance (Pract. Com. Law, 159, 332; First Book, 315, 316).

VIII. *Defective pleading.*—This question is much too vague, as the defect should have been stated in order to enable any one to frame a correct answer. However, where a pleading is defective, and it be not such a matter as is amendable or aided at common law, or by statute, and a writ of error would lie, the defendant may, after verdict, apply to have the judgment arrested. But frequently a defect may be cause for setting aside the pleading or signing judgment, or demurring. Or the defect may be such as would entitle the plaintiff to judgment *non obstante veredicto* (see *infra*), or would give either party a right to apply for a repleader (see First Book, 314; Pract. Com. Law, 276—278).

IX. *Issue.*—A cause is at issue when one party denies expressly what the other affirms, or agrees that what the other has denied shall be tried by a jury, or decided by the court. It is the completion of the pleadings, and, indeed, is derived from *exitum*, signifying an end. There may be several issues in a cause (Pract. Com. Law, 160; First Book, 309).

X. *Plaintiff abroad, &c.—Security for costs.*—If the defendant be out of the jurisdiction of the court, the defendant may apply for security for costs. The application should, in general, be made before issue is joined (Pract. Com. Law, 175—179).

XI. *Verdict—Nonsuit.*—On a verdict for a defendant, the plaintiff cannot bring another action for the same cause, or at least the former verdict may be pleaded, whilst, where he is merely nonsuited, he can bring such second action (Pract. Com. Law, 238, 239).

XII. *Non obstante veredicto.*—A judgment *non obstante veredicto* is obtained by a plaintiff where the defendant's pleas though found for him are no answer in point of law to the plaintiff's claims; as where the plea confesses the cause of action, and avoids it by matter which is clearly on the face of the record, no answer to it (Pract. Com. Law, 276). The judgment is obtained on motion to the

court. Neither party is entitled to costs (see 6 Law Stud. Mag. 235; *ante*, pp. 82, 83).

XIII. *Feigned issue*.—A feigned issue is one directed by a court without having recourse to the ordinary proceedings in the action. It is a short statement of the points in dispute, and thereupon the parties proceed to trial. A feigned issue is directed at law where a defendant sued is threatened with proceedings by a third party who claims the subject-matter of the suit, and the defendant who does not claim any interest, but is willing to pay the right party; or where the sheriff has seized goods of a defendant, and a third party alleges they are his; in such cases a feigned issue is directed. The issue is directed by the court, or (more usually), by a judge at chambers, and if the parties disagree on the form, the judge settles same (Pract. Com. Law, 371—380).

XIV. *Enforcing verdict on feigned issue*.—Where a verdict is had on a feigned issue, the successful party must apply to the court or judge directing the issue, for a rule or order for allowance of costs, which are in the discretion of the court or judge, and may be apportioned between the parties. The court has no jurisdiction where the original order was made by a judge. The party has fifteen days after taxation to pay (2 Dowl. N. S. 261; 6 Dowl. 293; Pract. Com. Law, 380; 7 Dowl. 721).

XV. *Withdrawing juror*.—If a juror be withdrawn, each party pays his own costs, and the action is put an end to (Pract. Com. Law, 238).

EQUITY.

I. *Married woman's future rights*.—A married woman may dispose of property to which she will become entitled on the happening of a future event, if it relate to realty; but if it is an interest in personalty only she cannot dispose effectually of it (see 8 & 9 Vict. c. 106, s. 6; Princ. Eq. 429—434; 5 Law Stud. Mag. 231).

II. *Bill against trustee unwilling to act*.—A party appointed trustee without his consent, and who is unwilling to act, should, if a bill be filed against him, put in a disclaimer (see Pract. Equity, 155, 156, as to disclaimer being accompanied by answer). If there have been a disclaimer before the suit is instituted, by deed (*Stacey v. Elph*, 1 My. and Ke. 199), the trustee ought not to be made a party to the suit (*Richardson v. Hulbert*, 3 Anstr. 68). But if he has not so actually disclaimed he is properly made a party (*Norway v. Norway*, 2 Myl. and Ke. 278; *Bray v. West*, 9 Sim. 429). He will only be entitled to costs as between party and party, except perhaps where the plaintiff's subsequent conduct has been vexatious (*Ibid.*; *Williams v. Longfellow*, 3 Atk. 582; *Skerratt v. Bentley*, 1 Russ. and Myl. 655, but *semble*, overruled, 2 Myl. and K. 278).

III. *Wife's equity to a settlement.*—Where a married woman becomes entitled to a legacy not given to her separate use, if the husband is obliged to come into equity to recover same, the court will oblige him to make a suitable settlement on the wife out of the amount of the legacy. It seems to be doubtful whether or not the wife can go into equity and force the husband to make a settlement where he can recover it without the interposition of such court. On principle she ought to have that right, and it has been decided in the case of his proceeding in an ecclesiastical court, a court of equity will interpose (see *Princ. Equity*, 417—419, where the subject is very fully considered).

IV. *Covenant to insure, relief in equity.*—It is a general rule that courts of equity will not give relief against a re-entry for forfeiture by reason of a breach of covenant in a lease, if the amount of compensation cannot be ascertained by mere computation (*Princ. Eq.* 388), and the courts have always refused, on this principle, to interfere where the forfeiture is occasioned by the omission to insure pursuant to a covenant (*Princ. Eq.* 389), unless there be fraud, mistake, or accident (*Ibid.*; and see *Arch. Land. and Ten.* 333, 334; *Coote's Land. and Ten.* 280, 656; *Rolfe v. Harris*, 2 Price, 206, note; *Reynolds v. Pitt*, 2 Price, 212, n.; 19 Ves. 134; *Thompson v. Guyon*, 5 Sim. 65). Neither would a court of equity give relief in the case put in this question, for there has been a breach of covenant, for the landlord, though in fact he has not sustained any actual loss, cannot by any money payment be put into the same position as he was entitled to be under the covenant. The case of *Green v. Bridges* (4 Sim. 96), is very near this case.

V. *Perpetuating testimony.*—The party entitled in remainder may file a bill to perpetuate testimony, and thus have the benefit of the testimony of the witnesses should they be dead when the will is disputed. This is allowed to be done where the matter cannot be immediately tried, as otherwise important testimony might be lost (see *Princ. Eq.* 450; 1 *Law Stud. Mag.*, N. S., *Abr. Eq.* 32). It is plain that the devisee in remainder could not during the subsistence of the life estate take any steps to enforce his claim.

VI. *Distringas on stock—Restraining order.*—The most speedy and summary way of preventing a transfer and apprehended misapplication of stock standing in the names of trustees, is to issue a *distringas*, which may be done on making an affidavit in the form prescribed by orders of the court. This is under sect. 5 of 5 Vict. c. 5. But this writ is in force only for eight days after request for transfer by the trustees. Another method which may be had recourse to in the first instance, or after the *distringas* has been issued, is to obtain a *restraining order* from the Court of Chancery on motion without notice or by petition. This is under sect. 4 of 5 Vict.

c. 5, and it seems that the order remains in force until discharged, which may, it seems be done unless a bill is filed within a reasonable time (see exp. Field, 1 You. and Coll. 2; re Hertford, 1 Hare, 584; 1 Phill. 129; 2 Dan. Pract. 1351, 1553; see as to parties to such a bill, Pract. Eq. 59, 60).

VII. *Parties to suit—Devisees of real estate.*—In the case here put A. and B. would be the proper parties to make defendants. The heir-at-law would not be required, unless indeed it were sought to have the will established against him (see 31st Order, Aug. 1841; Pract. Eq. 66). The specific legatee and the annuitants are not necessary parties, they being sufficiently represented by the devisees in trust, who have a power of sale and to give discharges as provided by the 30th Order of 26th August, 1841, stated Pract. Eq. pp. 65, 66, 76. If, indeed, the power of sale were not an immediate one, it might be otherwise (see Cox v. Barnard, 5 Hare, 253). The co-residuary legatee, H., might be a necessary party, if owing to a breach of trust the whole fund should not be forthcoming (see Lenaghan v. Smith, 2 Phill. 301; S. C. 16 Law Journ., N. S., Chanc. 376; 11 Jur. 503; see further Pract. Eq. 79, 80).

VIII. *Heir-at-law party to suit.*—The heir-at-law of a deceased person ought to be made a party to a suit for the administration of the estate of such person where it is desired to have the will established against him (Pract. Eq. 64). So in suits by specialty creditors, for satisfaction of their demands out of the real estate of a person deceased, the heir should be brought before the court (Pract. Eq. 80).

IX. *Assignment of fund.*—The assignee of a trust fund should immediately give notice of the assignment to the trustees (Princ. Eq. 308—310; 6 Law Stud. Mag. 85, 127; 7 Jur. pt. 2, p. 343; 9 Jur. 934).

X. *Payment of legacies and simple contract debts before specialties.*

—The order of administration is to give a priority to debts by specialty, then come simple contract debts, and afterwards legacies (Princ. Eq. 129, 130). It is clear that if an executor pays legacies without passing his accounts in Chancery, he will be liable (to the extent of assets) to the payment of debts, even though he had no notice of them (Princ. Eq. 129; 3 Myl. and Cr. 122; 1 Beav. 540). But if an executor pay simple contract debts before specialties, not having any notice of the latter, he is not in any way chargeable, if he have no other assets (see Smith v. Day, 2 Mees. and W. 684; 2 Steph. Com. 194, 2nd edit.; also 4 Law Stud. Mag. 19, 20, where this subject is explained). As to covenants to indemnify not broken at testator's decease, see vol. i., N. S., 164, 165.

XI. *Executor retaining debt.*—An executor or administrator is entitled to retain a debt due to himself in preference to other credi-

tors of equal degree, though there be the usual decree for administration (Princ. Eq. 130, 131; 5 Russ. 29; 1 Sim. and Sta. 458).

XII. *Administration suit—Restraining action.*—After a decree in an administration suit, a creditor capable of coming in under such decree cannot proceed at law (see Princ. Eq. 127, 128).

XIII. *Administration suit—One executor dying.*—If in an administration suit one of two executors, defendants, dies, the suit it should seem is abated, or at least may not be capable of being effectually prosecuted. The point is, however, anything but clear (see 2 Dan. Pract. 249, 250, 2nd edit.). The reason why it is said that the representatives of the deceased executor should be brought before the court is, that as all the executors of a testator have a right to receive the assets (see Princ. Eq. 355—357), part might be in the hands of one, and part in another, and so complete relief could not be obtained without making the representatives of the deceased executor parties, as some parts of the assets may be in their hands (see Hall v. Austin, 10 Jur. 452).

XIV. *Injunction—Issue.*—Where an injunction is granted, the court where the matter is not of exclusively equitable cognizance, generally directs an issue to be tried in order that the legal right may be settled by a jury (Princ. Eq. 248; 12 Jur. 404).

XV. *Enrolling decree.*—The enrolment of a decree prevents a re-hearing before the same judge, or an appeal to the Chancellor (First Book, 336; Pract. Eq. p. 312).

BANKRUPTCY (Mag. vol. 1, N. S., p. 176).

I. *Adjudication.*—In order to obtain an adjudication in bankruptcy, proof must be given before the commissioner of a good petitioning creditor's debt (*ante*, 50; First Book, 248), of the party being a trader (*ante*, 20, 49, 86), and that he has committed an act of bankruptcy (*ante*, 20; see First Book, 249; 2 Steph. Com. 143, 2nd edit.).

II. *Acts of bankruptcy.*—The principal acts of bankruptcy are, 1. Departing from dwelling-house, or realm, or otherwise absenting. 2. Beginning to keep house or remaining abroad. 3. Procuring or suffering arrest, or going to prison, or allowing to be outlawed. 4. Procuring goods, money, or chattels to be attached or taken in execution. 5. Making fraudulent conveyance, gift, &c., of lands, goods, or chattels. These acts must be done with intent to defeat or delay creditors (2 Steph. Com. 139, 2nd edit.). 6. So lying in prison for twenty-one days or escaping; or making a private arrangement with the petitioning creditor after docket struck (5 Law Stud. Mag. 26, 27; *ante*, p. 50), are acts of bankruptcy. But the principal act of bankruptcy arises from the debtor not paying, &c., after being summoned in the Court of Bankruptcy so to do (see 2 Law Stud. Mag. 370—373, 438—443, 473—478).

III. *Compulsory act of bankruptcy.*—A creditor can hardly be said to be able to compel his debtor to commit an act of bankruptcy; but he may be active in forcing him to do so, by—1. Arresting or detaining him in prison for debt, when if the debtor cannot get out within twenty-one days he commits an act of bankruptcy. 2. And so the creditor may summon the debtor before the Court of Bankruptcy to pay or secure, &c., the debt, and in default the debtor will commit an act of bankruptcy (see 1 Law Stud. Mag., N. S., 79, 80; 2 Law Stud. Mag. 441, 442, 474—477; 2 Steph. Com. 140, 141, 2nd edit.).

IV. *Attorney bankrupt.*—An attorney or solicitor, as such, is not liable to the bankrupt laws, but he may make himself amenable to them by acting as a scrivener, and as such "receiving other men's moneys or estates into his trust or custody" (see *Lott v. Melville*, 3 Man. and Gr. 40; Selw. N. P. 196; 5 Jur. 436, 683).

V. *Disputing adjudication.*—The bankrupt may dispute the validity of the adjudication by showing cause against it before it is advertised in the *Gazette* (First Book, 249), or by petitioning the court within a limited period (*ante*, 87), or by bringing an action against the assignees (see Selw. N. P. 192, 11th edit.; re *Thorold*, 1 Phill. 239; 3 Mont. Deac. and De Gex, 285; 8 Jur. 831; *ante*, p. 87).

VI. *Public meetings.*—At the first public meeting debts are proved, assignees chosen, and the bankrupt surrenders, if he pleases. At the second public meeting debts are proved, and the bankrupt surrenders, if he have not already done so. His final examination then takes place. An audit meeting is also appointed.

VII. *Fiat by trader.*—A debtor may himself sue out a fiat, on first filing a declaration of insolvency (7 & 8 Vict. c. 96, s. 41; 6 Law Stud. Mag. 248, 249; 2 *Id.* 27, 344, 443, 520).

VIII. *Sale not making trader.*—A party may, without subjecting himself to the bankrupt laws, sell articles of merchandise where he has no general intention to get his living by such means (1 Rose, 84, 402; 1 Term Rep. 572). So where he is an infant (9 Bing. 365; 2 Law Stud. Mag. 370), or where an executor or trustee merely sells off the stock in trade of the deceased (2 Law Stud. Mag. 519; 1 Atk. 102; Harr. N. P. 652, 653).

IX. *Members of companies.*—The members or subscribers of an incorporated commercial or trading company, established by charter or act of Parliament, are not liable, *as such*, to become bankrupts. This is expressly enacted by 6 Geo. 4, c. 16, s. 2 (see Harrison's N. P. 651, and note (h) there; see also s. 2 of 7 & 8 Vict. c. 111. Mr. Stephen, vol. ii, p. 137, n. seems to think this last act has affected the 6 Geo. 4, c. 16, s. 2).

X. *Fiat against joint-stock company.*—In order to obtain a fiat

against a joint-stock company, a creditor not having a judgment, &c., must (7 & 8 Vict. c. 111, s. 7) file an affidavit of debt, of a proper amount, in a court of law, and sue out a writ of summons, which must be served on the chief clerk, &c., of the company. If the company do not, within one calendar month, pay, &c., such debt, or make it appear to a judge that it is their intention to defend the action upon the merits and enter an appearance accordingly, the company will be deemed to have committed an act of bankruptcy. By ss. 5 & 6, creditors having a judgment or decree, &c., may serve a fourteen days' notice requiring payment. So by s. 4, the company itself may resolve that it is unable to meet its engagements, and that shall be an act of bankruptcy. This act, is, however, seldom acted on, as the affairs cannot be properly wound up, which is accomplished under 11 & 12 Vict. c. 45, noticed 1 Mag., N. S., pp. 63—65, 167—171.

XI. *Reputed ownership*.—Property, *i. e.*, goods and chattels, of third persons in the bankrupt's possession at the time of the fiat, will, if he have taken upon him the sale, alteration, or disposition thereof as owner, pass to the assignees (6 Geo. 4, c. 16, s. 72; 6 Law Stud. Mag. 362; *ante*, p. 21; First Book, 250).

XII. *Security for debt*.—Where a creditor has a legal or equitable security for his debt (as a mortgage) with a power of sale, he may at once apply to the commissioner to take the account, and thereupon the property will be sold by the assignees, and if there is any deficiency the creditor will be allowed to prove for same and receive dividends thereon. If there be no power of sale, a petition must be presented to the Vice-Chancellor in bankruptcy for an order to sell. If there is any deficiency, a dividend may be received on same (6 Law Stud. Mag. 250; 5 *Id.* 293—295; *ante*, p. 21).

XIII. *Leaseholds*.—The assignees of a bankrupt are not bound to accept leasehold property of the bankrupt which will be of no value to the estate (see Princ. Com. Law, 108—111; 6 Law Stud. Mag. 250).

XIV. *Assignee purchasing*.—An assignee cannot purchase property of the bankrupt at a sale unless he have first obtained leave to bid (see 1 De Gex, 265).

XV. *Fraudulent preference*.—In order to constitute a fraudulent preference of a creditor it should be shown that the transaction was voluntary, made in contemplation of bankruptcy, and with a view to prefer the particular creditor. "The proper definition of a fraudulent preference is a voluntary preference *moving from* the bankrupt in favour of a particular creditor, and in *contemplation* of bankruptcy." *Per* Parke, J., in *Morgan v. Brundrett*, 2 Nev. and M. 287; S. C. 5 Barn. and Adol. 298; see 2 Law Stud. Mag. 239, 240; 6 *Id.* 251.

CONVEYANCING (vol. 1., N. S., 176).

I. *Uses and trusts*.—A use is that interest which the statute of uses has transferred into a legal estate; a trust is the right to enjoy the profits and to call for a conveyance of the legal estate in equity (First Book, 204; Princ. Eq. 267).

II. *Chattels real*.—A chattel real is an estate in lands not amounting to a freehold (1 Steph. Com. 268, 2nd edit.; First Book, 228).

III. *Husband's rights to chattels real*.—The husband may dispose of the chattels real of his wife during the coverture, and if he survive her he will be entitled to them (First Book, 236).

IV. *Uses in strict settlement*.—By uses in strict settlement are meant those limitations which prevent the estate settled from being alienated until the eldest son attains twenty-one. The limitation may be to the parents for life with remainder to the first and other sons of their bodies and their respective heirs male, and afterwards (generally) to the daughters and the heirs of their bodies as tenants in common. Formerly a limitation to trustees to preserve contingent remainders was inserted, but this is not now in general necessary (see Watk. Convey. by White, 111—112; *Id.* by Merrifield, 81—83; Princ. Eq. 283—292).

V. *Leases for life, &c.*—A lease for the life of the lessee passes a freehold interest, whilst a lease for ninety-nine years, if he shall so long live, only passes a chattel interest.

VI.—*Lease—Lessee's and assignee's liability*.—A lessee is always liable on the express covenants of the lease, whereas an assignee by his assignment over gets rid of all liability for subsequent breaches, except so far as he may have rendered himself liable under an indemnity (Princ. Com. Law, 106, 127, 128).

VII. *Lease—Lessee's Executor's liability*.—An assignee of a lessee is liable whilst he continues such to the extent of the covenants in the lease, whilst the executors of the lessee are liable only to the extent of what the property yields (Princ. Com. Law, 115, 127).

VIII. *Lease by tenant for life*.—The lease for years of tenant for life binds the remainder-men only where it has been confirmed by them (Bac. Abr. tit. "Leases," I. 2).

IX. *Length of title*.—A purchaser of a freehold estate usually requires a sixty years' title (Cooper v. Emery, 1 Phill. 388; 8 Jur. 181; Princ. Equity, 218).

X. *Verifying pedigree*.—The evidence usually adduced for the purpose of verifying a pedigree is as follows:—authenticated certificates of marriages, births, deaths, extracts from family Bibles, inscriptions on tombstones, statements in wills, recitals in deeds or

in a bill in Chancery (11 East, 504; Bull. N. P. 246), the books in the Herald's-office (J. Jones, 224), declarations of persons well acquainted with the family, undisturbed possession in accordance with the pedigree (see 1 Prest. Abst. 43, *et seq.*; 1 Russ. Rep. 601; 2 Atk. Convey. 643).

XI. *Judgment*.—A judgment at law becomes a charge on real estate from the time of its being signed, but as against purchasers, mortgagees, and creditors, only on its being registered (*ante*, 25, 26; 6 Law Stud. Mag. 204; Pract. Com. Law, 281—285).

XII. *Incumbrances*.—A search should be made for judgments, *lis pendens*, and crown debts, against the vendor of a real estate. It should also be ascertained whether he has or not been bankrupt or insolvent, though the necessity for these latter searches has been somewhat diminished by recent enactments (6 Law Stud. Mag. 204; First Book, 250, 251).

XIII. *Execution of will*.—A will, whether of real or personal estate (with certain exceptions), should be in writing, be signed at the foot or end thereof (1 Law Stud. Mag., N. S., 166; 13 Jur. 568), in the presence of two witnesses present at the same time, and they must subscribe in the presence of the testator, and it is better for them to do so in the presence of each other (see 7 Jur. 205; *ante*, p. 98; 3 Curtis, 79, 395; Browell's Stat. 203, note).

XV. *Alienation by married woman*.—A married woman's conveyance of her real estate will be ineffectual unless her husband join therein, except in cases in which the court dispenses with his concurrence (1 Steph. Com. 553, 555; First Book, 217, 218; Browell's Stat. 97, 135, 277, 278).

CRIMINAL LAW.

I. *Accessory — Controverting principal's conviction*. — Though upon an indictment against an accessory, the record of conviction is evidence of the guilt of the principal, yet it is not such conclusive evidence as to preclude the accessory from endeavouring to prove the principal's innocence (Forster, 365—368; R. v. Smith, 1 Leach, 228; Archb. Crim. Evid. 688, 689, 690). There does not now seem to be any advantage derivable from this, as by the 11 & 12 Vict. c. 46 (First Book, 479, 480; 1 Law Stud. Mag., N. S., 9), both the accessory before and after the fact may be tried for a substantive felony though the principal have not been convicted (1 Law Stud. Mag., N. S., 9).

II. *Insanity*.—Where the jury acquit the prisoner on the ground of insanity they must find specially whether he was insane at the time of the commission of the offence, and whether he was acquitted on that account (39 & 40 Geo. 3, c. 94; 4 Steph. Com. 102, 2nd edit.).

III. *Traversing*.—Formerly, in misdemeanors, the defendant could, and usually did, traverse over to the session after pleading not guilty. But by 1 Geo. 4, c. 4, s. 3, this right is narrowed, and it is provided in cases of misdemeanors (except for non-repair of highways), that where the defendant has been committed to custody, or held to bail twenty days before the assizes or sessions at which the indictment is found, the defendant shall plead to the indictment, and proceed to trial at the same assizes or sessions, unless a writ of *certiorari* is delivered before the jury are sworn. And by sect. 5, that where the defendant has not been committed or held to bail twenty days before the session at which the indictment is found, but has been committed or held to bail to answer for such offence at some subsequent session, or has received notice of the indictment being found, twenty days before such subsequent session, he shall plead to the indictment at such subsequent session, and the trial shall proceed thereon at the same session, unless a writ of *certiorari* is delivered before the jury are sworn.

IV. *Several counts*.—Counts for distinct misdemeanors may be included in the same indictment; for it is a rule that several offences which may be tried by the same rules, and which have the same legal character, may be charged in one indictment (2 Hale, 173; Dickinson's Sess. 170, 5th edit.).

V. *Former conviction*.—A prosecutor cannot give in evidence a former conviction until the prisoner has been convicted of the subsequent felony, unless, indeed, evidence be given by the prisoner of good character, or it be elicited by him on cross-examination (Gadbury's case, 8 Car. and Pay. 676). A certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, &c., is, upon proof of identity, sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same (see 7 & 8 Geo. 4, c. 28, s. 11, as amended by 6 & 7 Will. 4, c. 111; Archb. Crim. Evid. 126, 794—696, 10th edit.; Roscoe's Crim. Evid. 222, 223, 2nd edit.; Reg. v. Crofts, 9 Car. and P. 219).

VI. *Burglary*.—Burglary is the breaking and entering or breaking out of a dwelling-house of another in the night-time with the intent to commit some felony within the same (see *ante*, 50, 51), on the trial of an indictment for burglary, the prosecutor must prove—1. The breaking. 2. The entering (if the indictment be for breaking and entering). 3. That the house broken and entered was a mansion-house, i. e., either a dwelling-house, or some building between which and the dwelling-house there was a communication, either immediate or by means of a covered and inclosed passage leading

from one to the other (7 & 8 Geo. 4, c. 29, s. 13). 4. That the breaking and entry, or breaking out, were in the night time, i. e., between nine in the evening and six in the morning (1 Vict. c. 86, s. 4). 5. That the breaking and entry were with the intent to commit a felony, or the being in and committing a felony, and afterwards breaking out (Archb. Crim. Evid. 297—311, 10th edit.; Roscoe's Evid. 302, *et seq.* 2nd edit.).

VII. *Punishment of burglary*.—Burglary is punished with death where the offender commits in the dwelling-house an assault with intent to murder any person being therein, or stabs, cuts, wounds, beats, or strikes such person (6 Law Stud. Mag. 251).

VIII. *Bankrupt concealing, &c., part of estate*.—The 6 Geo. 4, c. 16, s. 112, is repeated in 5 & 6 Vict. c. 122, s. 32. To support an indictment against a bankrupt for concealing and embezzling part of the estate, the prosecutor must prove—1. The trading. 2. The trading. 2. The petitioning creditor's debt. 3. The act of bankruptcy. 4. The fiat duly enrolled. 5. The adjudication, notice to bankrupt, and advertisement in *Gazette* (these all seem necessary notwithstanding 5 & 6 Vict. c. 122, s. 25; *ante*, p. 87). 6. That the time for the last examination has passed (*R. v. Walters*, 5 Car. and Pay. 138). 7. The removal, concealment, or embezzlement. 8. That the value is £10 or upwards. 9. The intent of the bankrupt to defraud the creditors (Roscoe's Crim. Evid. 269, 270, 2nd edit.; Archb. Crim. Evid. 287, 288, 10th edit.).

IX. *Forgery*.—An indictment for forgery may be maintained even where it is shown that no such person as that whose name appears upon the instrument exists (Archb. Crim. Evid. 359, 10th edit.; Foster, 116; 1 B. and B. 300).

X. *Perjury, evidence*.—In order to support an indictment for perjury, it should be proved that the oath was administered by a person having authority, that the perjury was committed in a judicial proceeding, that it was in some point material to the question in dispute, and was wilful (3 Coke's Instit. 164; Hawk. Pl. C. b. 1, c. 69, s. 2). Proof of the substance of the oath and of its falsity must also be given. Some one or more of the assignments of perjury must be proved by two witnesses (see Archb. Crim. Plead. 564—577, 10th edit.).

XI. *Subornation of perjury*.—Subornation of perjury is the offence of procuring another to take such a false oath as constitutes perjury in the principal (4 Steph. Com. 296, 297). The perjury must be proved to have been committed as stated in previous answer, and it seems that the mere production of the record of the perjurer's conviction (if convicted) will not be sufficient. There must also be proved, the inciting by the defendant, and that he knew that the

evidence to be given was false (Roscoe's Crim. Evid. 776, 2nd edit. Archb. Crim. Evid. 577, 10th edit.).

XII. *Criminal information*.—An application for a criminal information must be made to the Court of Queen's Bench (*ante*, 101). The essential difference between proceedings by criminal information and by indictment is that the former is confined to misdemeanors, whilst the latter applies also to felonies; an indictment must be found by a jury, but an information need not; and the prosecutor of an information must give a recognizance to prosecute with effect, and to pay costs to the defendant in case he is acquitted (4 Bac. Abr. 412; 4 & 5 Will. and Mary, c. 18).

XIII. *Conspiracy*.—In order to support an indictment for conspiracy it must be shown that two persons at least were concerned in the commission of the offence (Dickins. Quart. Sess. 338, 5th edit.; Strange, 193). But a single person may be indicted alone, if it be alleged that he conspired with another or others, whether known or unknown (Rex. v. Cooke, 5 Barn. and Cres. 538; 3 Burr. 1262).

XIV. *Conspiracy, husband and wife*.—An indictment for conspiracy between husband and wife only cannot be supported, as they are but one in the eye of the law, and the offence of conspiracy cannot, from its nature, be committed by one alone (Hawk. Pl. C. 72, s. 8; Archb. Crim. Evid. 17, 677, 10th edit.; Dick. Sess. 338; 5th edit.).

XV. *Conspiracy, object not effected*.—An indictment for conspiracy may be supported, although the unlawful object for which it was entered into be not effected; for the offence is deemed to consist rather in the guilty combination or agreement, than in the act by which it is carried into effect (9 Co. Rep. 56b; Salkeld, 174; 4 Steph. Com. 294, 2nd edit.). It is, indeed, usual to set out the overt acts, i. e., those acts which may have been done by any one or more of the conspirators, in order to effect the common purposes of the conspiracy. But this is not essentially necessary (2 Barn. and Ald. 204; 1 Adol. and El. 706; 5 Q. B. Rep. 49; Archb. Crim. Evid. 675, 10th edit.).

MUTUAL CORRESPONDENCE.

We find that some of our new subscribers do not exactly understand the plan of "*Mutual Correspondence*." In the first place, it is carried on wholly independent of ourselves. In the second place, letters are sent direct to the parties addressed, and *not* through us.

Thirdly, the correspondence is carried on between articulated clerks and any solicitors who may please to join in it. Fourthly, the parties must have their names and addresses inserted in the *MAGAZINE* as willing to correspond. Fifthly, the subjects of correspondence are generally the Moot Points, but we believe that many carry on a communication upon other subjects, though, of course, this is a matter of choice with the parties. It may often be useful to get into correspondence upon difficulties arising in reading or even in practice. Sixthly, the best mode of getting into correspondence is to insert a Moot Point, with the name and address appended, with a request for communications. Another method is to write to any one putting his name and address to the Moot Points or Answers. If neither of these means are effectual, then parties whose names are published as correspondents may be addressed on any point.

The plan of Mutual Correspondence has been acknowledged by several who have practised it as being extremely useful, and we cannot doubt this. Of course, every one will be anxious not to waste his own time or that of his correspondents upon trivial matters, and will endeavour to give the most information he can upon any subjects respecting which he may be written to. Some trouble will necessarily have to be taken in order to make the plan fully successful.

We trust that this explanation may cause many of our new subscribers to send us their names for publication as correspondents. A full list of correspondents will be found at pp. 41, 42, to which the following are to be added:—

Mr. W. Bunting, at Messrs. Parsons, Mansfield; Mr. C. Chapman, at W. Chapman's, Esq., Devonport; Mr. G. Crump, Jun., Greatfield House, Kidderminster; Mr. E. Heathcote, S. Bellamy's, Esq., Gainsborough, Lincolnshire; Mr. R. W. Hillman, Lyme Regis, Dorsetshire; Mr. J. Lowes, at Messrs. Chaters', Newcastle-upon-Tyne; Mr. W. P. Moser, of No. 12, Gray's-inn-square, London; Mr. W. J. Scott, of North Walsham; Mr. R. Taylor, of 14, New-street, Huddersfield; Mr. J. Watts, at J. K. Watts, Esq., St. Ives, Huntingdonshire; Mr. G. Wilkinson, of North Walsham. The address of Mr. J. D. Norwood is *now* No. 65, King William-street, London-bridge, London; and of Mr. F. T. Keith, No. 98, Guildford-street, Russell-square, London. These should be altered at p. 42. The name of Mr. H. Glaister (at p. 42) is to be withdrawn, as he is too much occupied; also Mr. J. Cooke, of Devereux-court.

CORRESPONDENCE.

Descent—Half-blood (1 Law Stud. Mag. N.S., Supp. p. 69).

The difficulty appears to me to have arisen through a disregard of the rule that, on failure of issue of the purchaser, the inheritance shall go to *her* (see the interpretation clause to the 3 & 4 Will. 4, c. 106) nearest lineal ancestor, or his issue, sect. 6. On the death, then, of the daughter, the purchaser in the case mentioned by your correspondent as the reverse to that put by Littleton, I apprehend the representation to her must be carried through her *father* under the above section, having recourse to the mother only on failure of his line, when the brother of the half-blood would succeed *immediately* to his mother, and satisfy the wording of the 9th section as interpreted by the 6th. Whilst a brother of the whole-blood to the purchaser exists, as here seems to be the fact, he represents both the *maternal* and paternal branches to the exclusion of the half-blood, and consequently, if the half-blood is ever to inherit, it will be *immediately* after the mother, as the brother of the whole-blood must be dead to cause a failure of the *father's* line (see the 9th section fully explained in 2 Black. Com. 240, n., 21st edit.). In the hope that these remarks may be deemed worthy of a place in the forthcoming **MAGAZINE**, I remain, &c., J. R. S.

NOTE.—This communication seems correct, except perhaps what is said about the father's line, *i. e.*, the purchaser's paternal line. That is not necessarily exhausted by the death of the brother of the whole-blood. Several other communications received were either wholly or in part wrong—indeed it is astonishing what erroneous notions appears to exist as to half-blood. Some make the children to be half-blood to their mother. We beg to inform C. M. S. that he totally misconceives the point; J. G. is wholly mistaken in his conclusion, and T. H. W.'s illustration does not at all touch the point mooted. The question only arises where the parties are of the half-blood to the *purchaser*, *i. e.*, to the party from whom the descent is to be traced (see notes to sects. 6 and 8 of Littleton).

Estate pour autre vie—Copyholds (v. 5, p. 303).

In vol. 5 of the **MAGAZINE**, p. 303, it is stated that the old rule as to occupancy is now altered by three several statutes, *viz.*, 29 C. 2, c. 3, 14 Geo. 2, c. 20, and 1 Vic. c. 26. Would it not have been advisable to have distinguished between a freehold and *copyhold* estate of this nature, by stating that the *two first-mentioned* statutes do not

apply to a *copyhold* estate *pour autre vie*, and that the last-mentioned statute only applies to a copyhold estate *pour autre vie* of any person who should die before the 1st January, 1838, consequently that, on the death of a person before that period seised of such an estate, it would go to the lord in the absence of any limitation to the heirs (Watkins on Copyholds, by Vidal, 3rd edit. p. 438).

Yours respectfully, G. B. HARWOOD.

MOOT POINTS.

No. 50.—*Transfer of Mortgage.*

A. being mortgagee in fee of certain freehold hereditaments, by his will appointed B., C., and D. his executors, but the will contained no devise of mortgaged estates. B., one of the executors, is the heir-at-law of A., and to him, therefore, in the absence of any devise, the legal estate in the mortgaged premises descended. Afterwards, by indenture made in pursuance of the statute (4 Vic. c. 21), between B., C., and D., of the one part, and E. of the other part, B., C., and D. assigned the mortgage money, and conveyed the mortgaged premises, with all their estate, &c., unto the said E., her heirs and assigns, subject to the mortgagor's equity of redemption.

On this transfer the following question arises :—

“Will the conveyance by B., *jointly with the other executors*, be sufficient to pass the legal fee vested in him, there being no recital or statement on the face of the transfer that B. was the heir-at-law of A., nor anything to show that he intended to convey the fee as such heir.

GEORGE HENRY HOLT (Horbury, near Wakefield).

No. 51.—*Turnpike Toll Liability.*

A. occupies two farms in two separate parishes, about ten miles apart. In driving his cattle from one farm to the other it is necessary to cross a turnpike-road through a toll-gate or side-bar, at which a toll is demanded, but exemption claimed under 1 & 2 W. 4, c. 25, inasmuch as the cattle are going to or returning from pasture, and do not pass on the turnpike road more than the space of two miles.

Is A. legally exempted?

J. E. G. B.

P.S.—The local act passed, 54 Geo. 3, contains a similar clause of exemption as the above-mentioned statute.

No. 52.—*Bankruptcy.*

A. deposited £400 with a banking firm, consisting of three partners, for which he received certain accountable receipts. Subsequently the senior partner died, when A. placed the further sum of £300 in the hands of the new firm, and received a note for £700. The new firm have since passed through the Bankruptcy Court.

Query—Can A. prove for the £400 against the old firm?

T. P. P.

No. 53.—*Copyholds.*

A. and B. are seised of the manor of W. in fee simple in undivided moieties; A. has purchased one of the copyholds, which has been surrendered to him in fee, but he has not been admitted tenant thereof.

Does such surrender of a copyhold to the lord of an undivided moiety of a manor enfranchise it, and convert the entirety of it, or an undivided moiety of it, into freehold?

By the ancient custom of the manor of W., copyholds descend to the youngest son of the copyholder who dies intestate, and seised thereof in fee simple or fee tail.

Is this custom altered or abrogated by the recent Act of Descents of 3 & 4 Will 4, c. 106?

A LAW STUDENT.

ANSWERS TO MOOT POINTS.

No. 22.—*Mortgage—Devise* (vol. vi., p. 120; vol. i., N.S., Supp. p. 75).

The trust estate in this case would not pass to the three daughters, the residuary devisees, inasmuch as the devise to them is subjected to the payment of debts and funeral and testamentary expenses (*Rackham v. Liddall*, 11 Law Times, 472), and as the devisees were not the testator's coheireesses at law, they were not the proper parties to exercise the power of sale. In the conveyance to the purchaser it was recited that the sale had been made by the devisees by the direction of the executors, and that the heir-at-law, in order to obviate any doubt whether the legal estate passed to the devisees, had agreed to join in conveying the property to the purchaser.

Now it is clear that, under the circumstances, the *heir-at-law only* was the proper party to exercise the power of sale, and the question is, does this in effect amount to a sale by him? and I think it does not, and that his concurrence in the deed cannot be considered as curing the defect, inasmuch as the power of sale was a personal

confidence reposed in him which he could not authorise any one to exercise for *delegatus non potest delegare*.

I should be happy to correspond with or to see any further remarks of C. W. on this point.

G. B. HAYWOOD.

No. 31.—*Insolvent—Fresh Promise* (No. 4, N.S., p. 60).

"A discharged insolvent cannot revive a debt from which he has been discharged" (Prin. Com. Law, pp. 52, 83); therefore it would seem that A.'s creditor could not recover under the promise made to him by A.

J. BEAUMONT (Witham).

NOTE.—The 5 & 6 Vict. c. 116, had rather a bankruptcy than an insolvency aspect, and an answer given to a question under the general and ordinary insolvency act does not necessarily apply to it. But in fact the 5 & 6 Vict. c. 116, contains a provision (in which respect it is unlike the bankruptcy acts, while it resembles the insolvency act of 1 & 2 Vict. c. 110) that the *future acquired* property of the insolvent shall vest in the assignees on their laying claim thereto, so that the same reason which in general insolvency prevents a discharged insolvent from being bound by a subsequent promise applies under the 5 & 6 Vict. c. 116.

We find, since the above was written, that we have received several other communications on the point, of which we select the following, as being the result of correspondence:—

No. 31.—*For the Affirmative—Insolvent—Fresh Promise* (vol. i., N.S., p. 60).

The creditor cannot recover under the fresh promise, for it seems to be the intention of the insolvent acts to give to the person of the debtor an effectual discharge, and to apply all his effects, present and future, to the fair and proportionate satisfaction of his debts. In accordance with this intention, sect. 10 of the 5 & 6 Vict. c. 116, enacts that the final order shall be a sufficient plea in bar to any action brought against insolvent for *any debt contracted* before the date of filing his petition. It was decided in *Denne v. Knott*, 10 Law Journ., N.S., Ex. 80, that where an insolvent gives a bond for the payment of an old and a new debt, he may plead his discharge from so much of it as was contracted before his insolvency. The judges in *Philpot v. Aslett*, 3 Law Journ., N.S., Ex. 344, held the same. The case of an insolvent is different from that of a bankrupt, for the latter, on obtaining his certificate, has a control over his future property, and therefore may give a fresh promise (see 5 & 6 Vic. c. 122, s. 43); whereas, under 5 & 6 Vic. c. 116, it appears that the assignees take all the insolvent's present property, and have a right to all that is after acquired.

S. F. B.

No. 31.—*For the Negative—Insolvent—Fresh Promise* (vol. i., N.S., p. 60.)

I contend the creditor *can* recover under a promise given subsequent to his discharge under 5 & 6 Vic. c. 116, for as that statute, does not mention that a scheduled debt shall not be revived, as the 1 & 2 Vic. c. 110, s. 91, and the early insolvent acts do, the law, as unaffected by the protection statutes, I take to be as stated in Selw. Nisi Prius, p. 55, that "where, though a debt or duty remains uncanceled, yet the liability of the party to be sued is suspended either by the intervention of a rule of law or the provision of a statute, a subsequent promise will remove the suspension and restore the liability, so as give a right of action," and though, as my correspondent says, the 5 & 6 Vic. is a plea in bar to any action brought for a debt contracted before the date of the petition, still I say we sue for a debt, created, as it were, since by the promise in writing, which waives the advantage the law gave him: as you can for a debt barred by the statute of limitations, and as you can under a promise given by a bankrupt after his certificate.

HENRY HUGHES (High-street, Maidstone).

No. 1.—*Manor—Sale of Demesne Lands* (No. 1, N.S., Supp. p. 26

The manor is destroyed. In 1 Watkins's Copyholds, p. 32, it is said, "If the lord grant all the demesnes or all the services to a stranger, or if all the services become extinct, the manor will be destroyed (citing 6 Coke, 63 a, and other cases). In Soane v. Ireland, 10 East, 359, the proposition is taken for granted. See also Watkins's Copyholds, p. 9, 21. A manor may be suspended for a time and revive again, as when the lord leases all the demesne of the manor for years, the manor during the existence of the lease is suspended, but on expiration of the term it shall revive (1 Leon, 27, 28; see also Att.-Gen. v. Parsons, 1 Law Journ., N.S., 4, Ex. 103).

W. B. J.

No. 23.—*Intestacy* (No. 4, N.S., p. 58; No. 6, N.S., p. 96.

The children and grandchildren of the intestate take the latter *per stirpes* (Bl. Com. 517), for they are entitled as representing their respective parents (*ib.* 218, and Toll. Ex. 375). Mere affinity or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property, as if A. have a son and daughter, B. and C., and they both die, the former leaving a wife and the latter a husband; on A.'s dying afterwards intestate, such husband and wife have neither of them any claim on his estate (*ibid.* 386).

P. W.

No. 84.—*Power to appoint New Trustees* (vol. 6, p. 391).

We are informed that this point has been the subject of considerable

correspondence among some of our subscribers, and that great difference of opinion exists as to the correct answer.

We think there can be no doubt that if the power had been for the executors *for the time being*, or for the *acting* executors of the survivor, to appoint new trustees, an appointment by those who proved would have been good. We think that this is not contested. With respect, however, to a principal point in the case, namely, a power to the "executors" of the survivor to appoint new trustees, great difference of opinion exists in the profession. Our own opinion is that an appointment by those only who proved would be sufficient, and would be supported. The decision in *Harrison v. Harrison* (10 Jur. 273; stated 2 Law Stud. Mag. 472) shows the tendency of the courts to give more effect to the renunciation of one of the executors than was formerly done. And this case has been followed by the Court of Exchequer in *Venables v. East India Co.*, 12 Jur. 855. These cases do not, indeed, decide the point mooted, but they show the inclination of the courts to give a full effect to the renunciation of the executor until *he* does some act retracting it. But the case of *Yates v. Compton* (2 P. Will. 308) has always appeared to us a strong decision in favour of the opinion we have adopted, though not exactly in point, but proceeding on valid principles. There a party devised that his executors should sell his land, and out of the proceeds pay an annuity. One executor died and the other renounced. The administrator of the annuitant, being also administrator with the will annexed of the testator, filed a bill against the heir to compel a sale, and out of the proceeds to pay the arrears of the annuity. The Lord Chancellor decreed the land to be sold, and as to the objection that the surviving executor was not joined in the suit, it was held that, as he had renounced, there was no occasion for him to be a party. In other words, his renunciation not having been retracted, left the power of sale just as if he had never been nominated. It should, however, be remarked that, in *Daniell's Pract.* (vol. 1, p. 227, n.), it is said to be doubtful whether the renouncing executor should not have been joined in respect of the power of sale vested in him. There are other cases the principle of which might be urged in support of our view, but which it will not now be necessary to state, as we have been informed that there has lately been a decision in one of the equity courts on the point, but we believe it is not yet reported. If we meet with it we shall notice it at length, as the point is one of great practical importance.—EDS.

ERRATA.—At p. 106, line 8 from top, for "attaining twenty-one years of age," read "attaining twenty-five years of age."

ON THE LAW OF COVENANTS.

[Continued from *Supp.* p. 19.]

[We are sorry that we have not been able earlier to resume the Lectures on Covenants, but, as our readers know, this was not our fault, but arose from the space occupied by the answers to the Examination Questions. It is, we trust, fully understood that the articles in the body of the "Magazine" (pp. 29—36, 57—63, 85—91, 113—119, 141—146) form part of the Lectures, to which what has, and will yet appear in this "Supplement," may be considered as introductory. It will be noticed that the last six lines at p. 19, *ante*, do not belong to the Lectures, but relate to quite different subjects].

Parties to covenant.—We are now to consider how a covenant may be constituted. We have already (p. 11) seen that a covenant is an engagement under seal from one person or body to another person or body. A covenant will, practically, fail of effect if it be not clear who are the parties by whom and to whom it is made. However, it will be sufficient if it be made to appear who are the parties by any statements in any part of the deed (see *Saltoun v. Houstoun*, 8 Moo. 546; *S. C.* 1 Bing. 440; *ante*, pp. 16, 17; *Nurse v. Frampton*, 1 Salkeld, 214; *S. C.* 1 *Ld. Raym.* 28; *Walford's Act.* 10, 17, 18).

Informal covenant, specialty debt in equity.—There is a distinction as to holding covenants to be binding at law, and as a specialty debt in equity. There may be sufficient for holding the debt to be a specialty debt in equity, though no action would lie at law. Thus in the case of a party becoming a trustee and executing the deed of trust, and afterwards committing a breach of trust, the debt is always held in equity to be a specialty debt, and it will accordingly take precedence of debts due by him by simple contract. And this is the case where the language of the trust may be such as not to enable any one to sue him at law; as being defective in form, &c. (see *Lewin on Trusts*, 187, 188; *Mavor v. Davenport*, 2 *Sim.* 227; *Turner v. Wardle*, 7 *id.* 80).

Covenantee.—As to who is a covenantee it must be borne in mind that there are two classes of deeds, indentures and deeds poll (*ante*, pp. 13, 14). There is a distinction between these, and, till lately, the law laid down a different rule as to them. A deed poll is the deed of one party, the obligor, whilst an indenture is that of all. In the case of an indenture, the law did not admit of a covenant with a stranger. This statement should, perhaps, be limited to covenants relating to land, though there are authorities for saying it is quite

irrespective of land (see *Berkeley v. Hardy*, 5 Barn. and Cres. 355 ; *Southampton v. Brown*, 6 Barn. and Cres. 718).

There is another rule which mitigates considerably the severity of the above, which is this, that by executing or sealing the deed the covenantor becomes a party to the deed, though not named a party (see *Salter v. Kidgley*, Carth. 76 ; *Storer v. Gordon*, 3 Mau. and Selw. 322 ; *Berkeley v. Hardy*, 5 Barn. and Cres. 355), though the contrary has been held by some (see *Addis. Cont.* 239, 1st edit. ; *Platt on Cov.* 7 ; *Broom's Act.* 3 ; 6 Mau. and Selw. 75). This difference between an indenture and a deed poll, namely, that by indenture a stranger could not take, does not now apply as to indentures executed after the 1st of Oct. 1845. This is by the 8 & 9 Vict. c. 106, s. 5 (see *Addison on Contr.* 241 ; and see as to deeds executed between the 1st of Jan. and the 1st. of Oct., 1845, the 7 & 8 Vict. c. 76, s. 11).

Another general rule as to a covenantee is that he need not execute the instrument containing the covenant (see *Platt on Coven.* 78). There is one exception, and that is where, according to the rule above-mentioned, his execution would remedy the omission to name him a party. The general rule rests on the doctrine that if one party execute his part of the deed, it is his deed. It should be borne in mind that if, in consequence of non-execution, there should be an entire failure of consideration, the covenant cannot be enforced, as if the covenant be expressed to be made in consideration of the covenant of the other party, and that fails for some reason, no court of law or of equity would enforce it (see *Rose v. Poulton*, 2 B. and Adol. 822 ; *Cardwell v. Lucas*, 2 Mees. and W. 111, *Cooch v. Goodman*, 2 Q. B. Rep. 580).

Covenantors.—As to what parties may be covenantors, it is important to consider what has been before stated, namely, that a covenant is an engagement under seal, and that, therefore, no person whose seal did not appear to the deed could be a party. In general, there is no covenant, unless the covenantor have executed. There is a difference in this respect between an indenture and a deed poll. If it be a *deed poll* it is an invariable rule that, on the part of the grantee who has not executed it, it is of no effect (see *Platt on Cov.* 16). There must be an execution by him, but then it is no longer a deed poll, but it is the deed poll of both (see *Burnett v. Lynch*, 5 Barn and Cres. 589). In saying that a grantee under a deed poll, where not executed by him is not bound by the covenants, it is to be considered that we are speaking of the old common law.

As to covenants under an *indenture* the general rule is that a covenant cannot be established against a person who has not sealed the instrument. It is not, however, necessary that the covenantor should be named a party if in fact he has executed (see *Salter v.*

Kidgley, Carthew. 76; but see 9 Mees. and W. 95). If a person is named a party, but never executes the indenture, is he, nevertheless, liable on the covenants? As a general rule he is not, but there are certain exceptions. Thus a party claiming under letters patent is bound though he does not execute (*Ewer v. Strickland*, Cro. Jac. 240). So a party may be liable by custom, as by the custom of London, &c. A yet larger, and more important exception is that where the party accepts and takes the benefit of a conveyance by deed expressed to be made subject to certain covenants; in such case, though he have not executed, he is deemed to have assented to the deed, and is bound by the covenants on his part. This is put by Coke (1 Inst. 231 a) on the ground of the maxim of law, "*Qui sentit commodum sentire debet et onus, et transit terra cum onere.*" It has been said that this is at variance with the doctrine as to a contract being under seal or not, but it is not so, for the doctrine is, that a party acting on the basis of a deed, and taking its benefits is to be considered as having executed it. It does not at all interfere with the doctrine that a covenant (except by custom of London and Bristol) must be under seal. (The contrary doctrines are, however, held by Mr. Platt, 2 Treat. on Leases, p. 5, *et seq*; Platt on Cov. p. 10—16; and Broom's Parts. to Actions, pp. 4, 5, 22 h. to 22 k, 110, 111, 2nd edit., and the question must be considered an open one. See *Cooch v. Goodman*, 2 Q. B. Rep. 580; *Doe v. Wiggins*, 4 Id. 376; *Aveline v. Whisson*, 4 Man. & Gr. 801).

It is always supposed that because a party who claims under a deed poll is not bound unless he executes, that, therefore, such a party under an indenture is not bound. But an indenture is the deed of all the parties, whilst a deed poll is that of the party executing only. Therefore, a person, named a party, who by his own act ratifies it, must be considered to recognise it in its legal character. When a party under a deed poll recognises it, he merely gives it its legal character, i.e., it is the deed only of the party who makes it. On these principles (in the lecturer's opinion) the doctrine may be considered as well settled, that a party accepting a benefit under a deed, will be liable on its covenants, though he have not executed it (but see Platt and Broom contrary). Even though covenant would not lie on account of the non-execution by grantee, yet clearly equity will make him liable, as in the case of the assignment by deed poll of a lease not executed by assignee, in which case equity would hold the assignee bound to indemnify a lessee against liability (See judgment in *Sale v. Morris*, 1 Ves. and Beam. 11).

Implied covenants and their construction.—With respect to the question as to the manner in which implied covenants are to be construed, we may observe that though there is a great difference

between express and implied covenants in their nature, yet in respect of their construction there is in substance no difference. An implied covenant does not arise from any peculiar situation of the parties, but arises by force of some particular words used in the instrument. There is not any implied covenant raised necessarily when one party conveys, and another takes land, &c., that is, such a covenant does not arise from the mutual relation of grantor and grantee, releasor and releesee, &c. It arises when, on a conveyance from one person to another, certain words are used therein. The words having this effect in freehold conveyances were "give and grant," and in demises for a term of years they were "demise," and, perhaps, also, "grant." The covenant which the law held to be raised was an express covenant just as much as if it were set out at length. The covenant appeared in words, therefore was not implied, and there does not, therefore, seem to be much ground for the distinction taken in our books as to this. But as it is customary to make such a distinction, the terms will be here adopted, though, in fact, there is no real difference between them. Concerning the class of covenants arising from the use of the words "give and grant," they have little effect now, as their former effect has been lately taken away, and the doctrine, whilst it existed, was subject to so many exceptions that it is difficult to give a proper definition (see Bythewood and Jarman's *Convey*, Tit. "Grants;" Butler's Note to Co. Litt. 384 a). We may here advert to the acts for registry of deeds in Yorkshire. They are the 2 & 3 Anne, c. 4, the 6 Anne, c. 35, ss. 30, and the 8 Geo. 2, c. 6, s. 5. By these acts in all deeds of bargain and sale enrolled whereby any estate in fee is limited, the words "grant, bargain, and sell," shall amount to an express covenant that the bargainor is seised in fee, for quiet enjoyment and for further assurance, with this qualification, that the act is not to apply where the above words are restrained by express words (see 9 Jarman's *Convey.*, by Sweet, 689).

By sect. 4 of 8 & 9 Vict. c. 106, the word "give" or the word "grant" in a deed executed after the 1st Oct., 1845, shall not imply any covenant in law, in respect of any tenements or hereditaments, except so far as the word "give" or the word "grant" may, by force of any act of Parliament, imply a covenant. This exception in the act is said to have had reference to recent church buildings acts, in which, to diminish expense, the word "grant" had been declared to imply the usual covenants for title. But the exception has a much wider scope, as clearly the enactments in the Yorkshire Registry Acts still remain in full force, and the word "grant" still is a covenant in law.

Implied covenants in demises.—We now proceed to consider the subject of implied covenants, or covenants in law, in demises for a

term of years. Let it be borne in mind that there is a great distinction between implied *covenants* and implied *contracts*. Implied covenants arise where the parties have used certain expressions from which the law implied a covenant to warrant the title, &c., but an implied contract may exist without the aid of particular expressions. Thus, suppose a lessee assigns, subject to the performance of the covenants in the original lease, and payment of the rent thereby reserved, and there is no covenant on the part of the assignee, does the party taking, subject to the performance of the covenants, render himself thereby liable? He does not. But then the question arises whether if the burthen be cast on the lessee by the assignee's neglect, if the former have any remedy against the latter. The law, it is held, raises a duty on the assignee to perform the covenant, and pay the rent in every such transaction. The law creates an obligation from the very relation of the parties, because it would be unjust if the assignee were not bound after having had the estate, so that if the assignee neglect to discharge his common law duty, an action will lie for the recovery of damages for such neglect. The form of action may be either case or assumpsit, but case is preferable (see Broom's Part. to Actions, 136, n. u). This is an implied *contract*, as distinct from an implied *covenant*. The implied contract arises from the particular circumstances, whilst to raise an implied covenant there must be present in the instrument certain expressions which, however, are few and precise.

It is important to bear in mind that an implied covenant cannot arise against a person who has not sealed the instrument. This is the essential characteristic of covenants whether implied or expressed. But to constitute an implied contract it is not necessary that it should appear to be sealed; on the contrary, it is a remedy given by the law, because otherwise the party would be exempted from liability. If a lease be assigned by deed poll, the assignment is not executed by the assignee, as before stated, and if in such case the assignment be expressed to be subject to the covenants contained in the original lease, and to the payment of the rent thereby reserved, the assignee is not, as we have seen, bound, he not having sealed. Though, however, the law does not hold the assignee liable in covenant, yet it holds him responsible, as under an implied contract, as before stated (see *Buckworth v. Simpson*, 1 Cr. Mees and Rosc. 834; *Brown v. McFarren*, 5 Irish Law Rep. 212). In this last case, A., being lessee of certain premises, by indenture, assigned his interest therein to B., subject to the rent and performance of the covenants in the original lease. This indenture contained a covenant by B. to keep A. harmless and indemnified against all actions, suits, costs, and damages, on account of the rent and covenants in the original lease. B. never executed the assignment, but went into possession under it.

It was held, on demurrer, that B. was *not* liable in an action of covenant, for not having saved harmless and indemnified A. But, *semble*, A. might maintain an action on the case or assumpsit.

We may observe as to an implied contract that the liability in respect thereof continues only during the assignee's estate. In fact, his liability is commensurate with the time of his interest. The next succeeding assignee becomes liable during the continuance of his estate (see *Mills v. Harris*, 3 Moo. and Sc. 569; the judgment in *Wolveridge v. Steward*, 3 Moo. and Sc. 507). The practical result is that there would be an action on the case or of assumpsit where the assignee has not sealed the deed poll assigning the lease subject to the covenants and payment of the rent, if the rent were not paid or the covenants performed during the time of the continuance of the assignee's estate. If the assignee had sealed the assignment there would be an action of covenant, subject to the distinction hereafter mentioned. The question is, has the party sealed the deed, or has he accepted the estate under the deed without sealing.

How implied covenants are constituted.—What are the material points in the constitution of implied covenants? We have seen that the general doctrine is that an express covenant is created by any informal words showing that the parties agreed to perform or refrain from doing some act, and this is true of implied covenants, if, indeed, this doctrine prevailed in former times as in our days. Directly we have the doctrine that informality in expression does not interfere with the question of covenant or not, it becomes a question how far the words deviate from the orthodox form. The covenant of which *Saltoun v. Houston* (*supra*, 16, 17; S. C. 8 Moore, 546; 1 Bing. 440) was an instance, has just the same effect as an expressly worded covenant. Therefore, however irregular the structure, it is a covenant. The distinction as to express and implied covenants having formerly obtained must now be considered as binding us to the adoption of it. Implied covenants are distinguishable from express in particular by one very material quality—there must be a consideration for the implied covenant. Thus an implied covenant arises against a lessee for payment of the rent, and against a lessor for quiet enjoyment of the lessee, and, on the expiration of the lease, to perform the covenants, and pay the rent by the lessee. In such a case, if the consideration entirely fail, the covenant also will fail, but there must be an *entire* failure of consideration, for if it exists for a time, the partial failure will not interfere with the obligation to perform the covenants, but the party will have for that breach the proper remedy by action.

The word "assign" no implied covenant.—What are the words which create an implied covenant? By the word "assign" where a party assigns a lease for years to another, is there imported any co-

venant? It is merely used to describe the interest conveyed to distinguish it from a mere under-lease (see *Burnett v. Lynch*, 5 B. and Cr. 602). There is, indeed, a case in 1 Mod. Rep. p. 113 (*Deering v. Farington*) to the contrary, but it does not apply to an assignee of the estate in lands; as the assignor of a chose in action cannot possibly have the thing affected to be assigned. That case in *Modern Reports* would not now be acted on so far as respects implied covenants in a demise, either as against the party making or the party taking.

Words "grant, demise, and confirm."—It is common in a lease to find the words "grant, demise, and confirm;" the covenant which is thereby raised is to this effect: that the lessee shall quietly hold and enjoy the land during the term free from interruption by any person lawfully claiming title (*Watk. by White*, 302, 303, 8th edit.; 1 *Shepp. Touchst.* 160, 165). Remark, that it is not said, free from the interruption of persons *not* claiming under the lessor or not having title, but merely from rightful demands. Against a person not claiming under the lessor, or not having a title, the lessee is bound to defend himself. If a person rightfully entitled claim, the lessee has his action against the lessor on his implied covenant by the word "demise."

Words "demise" and "lease."—There is no authority that the word "lease," if used to create a term is not equally effectual to create a covenant. In fact, the word "lease" has not any legal operation, except as an equivalent expression for "demise." Therefore, there is little doubt but that it would be read as the word "demise."

Words "yielding and paying," or "paying."—As to the clause in a lease ordinarily designated the *reddendum*, commencing with the words "yielding and paying," and sometimes with the word "paying" only (*Watk. by Merrifield*, 397, 437), the legal effect of it is to create a covenant on the part of the lessee, and of every person who becomes possessed of the property by assignment, whether immediate or mediate. But it creates this covenant against the lessee so long only as he holds the estate, and it creates the covenant against the assignee so long only as he continues assignee (see *Adams v. Gibney*, 6 Bing. 656). It arises from privity of estate, and is a covenant binding the person who for the time being, becomes owner of the estate. It is a shifting covenant, passing from one owner to another, but it is in the full sense of the term a covenant, and the lessee and assignee may be sued on it as such. There was formerly a question made whether it was an implied or an express covenant. It is now clearly held to be an implied, and not an express covenant.

Implied covenant where not sealed.—The doctrine that a covenant is not complete without the covenantor, as well as covenantee, execute the deed is the same whether the covenant be an implied or an express

one. It is not an implied covenant merely because the deed contains a covenant, but the person who has to bear the burthen must have sealed the deed, but if the lease be by indenture, the party who accepts the estate under a lease which contains such a covenant, may (it is said, but see *suprà*) be bound, though his seal be not actually affixed thereto. So we should conclude that the lessee was bound to pay the rent, though he have not sealed the lease.

No implied covenant where an express one.—There is another important qualification as to implied covenants, and that is, that an implied covenant in a lease has no effect, if there be an express covenant on the same subject in the lease, for it is a maxim of law, *expressum facit cessare tacitum* (1 Shepp. Touchst. 160, n. c. 165 ; Watk. by Merrifield, 439 ; Bacon's Abr. Tit. "Covenant" B.). The cases of *Noke* in 4 Coke's Rep. 88, and of *Merril v. Frame*, 4 Taunt. 329, will illustrate this subject. In the former case, where the lessor *demised and granted* a house for a term of years, and covenanted that the lessee should enjoy the house during the term, *without eviction by the lessor, or any claiming under him*, it was held that the express covenant qualified the generality of the covenant raised by implication of law, from the words "*demise and grant*," and restrained it by the mutual consent of both parties, so that it should not extend further than the express covenant, and therefore the lessor is not liable for an eviction by a *stranger*. So in the case of *Merril v. Frame*, it was held that if a lease contain a covenant for quiet enjoyment against the lessor and those who claim *under him*, the lessee cannot, upon an eviction by a paramount title, recover under the implied covenant for general title implied in the word "*demise*." In this case the plaintiff's counsel contended, that although under the express covenant for quiet enjoyment against the lessor and all claiming under him, the plaintiff could not recover upon an eviction by a paramount title, yet the latter covenant did not restrain or destroy the implied covenant for an absolute good title, which was contained in the words "*demised and leased*," and cited *Gainsford v. Griffith* (1 Saund. 59) to show that there might be a distinct general covenant not restrained by the subsequent particular covenant. But the court expressed a decided opinion against the possibility of applying that doctrine to the present case. The rule of law was (they said) that *expressum facit tacitum cessare*. But the argument of the plaintiff would make *expressum* and *tacitum* to mean the same thing.

Things in esse.—Again, an implied covenant extends only to such things as are *in esse*, and parcel of the demise at the time of the demise. Therefore, no action lies against a lessor who stops a water-course formed after the lease, though it distinctly appear by the lease that such water-course was in actual contemplation at the time (see 1 Leonard, 278 ; 2 Bacon's Abrid. 344, 7th edit.)

No implied covenant on demise of goods.—Again, the law raises an implied covenant on words of demise only when the subject of demise is a thing *real*, for if the matter demised or property to be demised be a personal chattel, the lessee will not be entitled to an action of covenant for disturbance. This is of practical importance, for frequently goods and moveables are included in a demise. Therefore, you should never place reliance in that part which contains a reference to chattels, or words which otherwise would make an implied covenant against lessor or lessee, but there must be an *express* covenant and clause (see Com. Dig. tit. "Covenant," A. 4; Selw. Nisi Prius, 477. n. 14, 11th edit.; 2 Bacon's Abr. 343, 7th edit.; Harr. N. P., 578).

Quasi implied covenants.—There are some other instances in which covenants are called implied, but are to be distinguished; as where a man engages by deed, to do or avoid certain things for the benefit of another, and then it turns out that there were other things not provided for, but which it is necessary he should observe, if he is to carry out the transaction fairly; the rule is, that whatever was of necessity included in the terms, the law considers included in the covenant, just as if it were so in express terms (*Seddon v. Senate*, 13 East. 63). In this case, the proprietor of a medicine, and a recipe for making the same, "bargained, sold, assigned, transferred, and set over," the medicine and recipe, and all his "right, title, interest, claim, or demand to the said medicine, &c.," to a purchaser; it was held, that the law would imply from the transfer and assignment a covenant from the vendor, that he would not himself prepare and vend the medicine so assigned, or engage with others in so doing. Somewhat similar in principle, is the earlier case of *Dering v. Farington* (3 Keble, 304; Freem. 368; 1 Mod. R. 113) where a man by deed "bargained, sold, assigned, and transferred," a sum of money due to him from a third person; it was held that the law would imply, from the words of transfer and assignment, a covenant from the assignor to do no act to prevent the assignee from obtaining possession of the sum so assigned.

However, in such cases, if the meaning of the party extended only to such acts of the covenantor as would be a misfeasance, it does not impose on him a liability which he did not expressly undertake; as if the damage merely arise from the party being passive and doing nothing, he is not liable for his mere neglect or passivity, and merely standing by does not come within the covenant. In the case of *Pomfret v. Ricroft* (Saund. 321) Lord Hale said that: "If I lend one a piece of plate, and covenant he shall have the use thereof, yet if the plate be worn out by ordinary use, without any default, no action of covenant lies against me. In that case, lands were demised with the use of a pump on another piece of land, and the lessor

allowed the pump to get out of repair, but it was finally held that no action of covenant would be against the lessor, for there was no misfeasance. So, if I grant the use of a pump, the right to make a drain or reservoir, on other land than that demised, I thereby grant a free way and right to put it up—in fact, a right of way—but I do not engage to do that for the party.

PRACTICAL DIRECTIONS TO A CANDIDATE FOR EXAMINATION AND ADMISSION.

[Our readers are indebted for the following to a subscriber who, having himself experienced great difficulty in obtaining accurate information as to the necessary steps for examination and admission, has, since his admission, drawn up this statement for the benefit of future candidates. Having carefully examined it, we are able to say that it is perfectly accurate, and we are sure our readers will feel obliged to our correspondent for the statement.]—Eds.

Having fixed upon the term in which you propose to undergo the ordeal of the examination, commence operations by preparing a "Notice of Intention to apply for *Examination*," and a "Notice of Intention to apply for *Admission*." The forms of these notices may be taken from Chitty's Archbold. *Three clear days*, at the least, before the *commencement* of the term *preceding* that in which you propose to be examined, leave the *first-mentioned* notice at the office of the Incorporated Law Society, in Chancery-lane, and leave the other notice at the Queen's Bench Master's Office, in the Temple. At the same time copy the notice of intention to apply for *admission* into each of the two books kept for that purpose at the Judges' Chambers, Queen's Bench. One of these books you will find in the chief's office, up-stairs, and the other in the clerks' room below. Nothing further is to be done on your part until you receive from the secretary of the Law Society a notice of the day of examination, accompanied with a paper of questions to be answered by yourself and master. The answers to these questions, together with the original articles of clerkship, and any assignment thereof, are to be left at the office in Chancery-lane within the first seven days of the term in which the examination is to take place. On the day of the examination you will have to attend at "the Hall" at half-past nine, when a number will be given to you, and you will take your seat at the table appropriated to such number. At ten o'clock the examiners enter, and a paper, containing the questions, is delivered to each candidate. Until four o'clock is allowed to answer the questions, and

no answers will be received before one. The examination being finished you may ascertain your fate by applying on the following day, at about three o'clock, to Mr. Maugham, at the Hall. Having received the comfortable assurance that you are "all right," prepare an affidavit of due service under your articles, and an affidavit of the payment of the stamp duty on the articles (see the forms of these affidavits in Chitty's Archbold). On the next day (that is the day next but one after the examination) apply at the office in Chancery-lane for the examiners' certificate, which will be given to you, together with the original articles. Next go to Mr. Aldridge, at the Queen's Bench Masters' Office, in the Temple, for the *original affidavit* of the execution of the articles, which was filed there shortly after the date of the articles. Annex the articles to the *affidavit of due service*, and then swear that affidavit, and the one as to payment of stamp duty, at the Judges' Chambers. Take the affidavits so sworn, and the examiner's certificate, and also the affidavit as to the execution of the articles, to the judges' clerk, who will give you a fiat, returning the examiners' certificate and the affidavits as to stamp duty and execution of articles, but retaining the affidavit of due service, and the articles themselves which are annexed to it. Take the fiat, certificate, and the two remaining affidavits to Mr. Aldridge, and request him to prepare the admission for you, as, by so doing, you will save yourself further trouble on that head. He will tell you at what time you must attend at Westminster to be sworn. Be there at the time appointed, and you will take the oaths in the presence of one of the judges, and sign the Rolls. The examiners' certificate will be returned to you, and your admission in Queen's Bench (on £25 stamp) will be delivered to you. Proceed with this admission to the Masters' offices in the Courts of Common Pleas and Exchequer, and sign the Rolls of these courts. This completes your admission as an attorney of the common law courts. The next step is to be admitted in chancery. For this purpose leave your Queen's Bench admission with the Master of the Rolls' secretary, in Rolls-yard, and he will appoint a time for you to attend in the Rolls Court, Rolls-yard, to be sworn. This is generally the last day or last day but one of the term. You will then be sworn before the Master of the Rolls, and sign the Rolls of the court. You may receive back your Queen's Bench admission the next day, if you require it, but the chancery admission will not be delivered until about a fortnight afterwards. If you desire to be admitted in bankruptcy, go to the Court of Bankruptcy, Basinghall-street, and, upon producing your *chancery* admission to the clerk in the chief registrar's office, you will be allowed to sign the Roll, and will receive a certificate of admission in that court. This admission qualifies you to practice, also, in the Insolvent Court. You may now congratulate yourself on having arrived

at the state of a full-blown attorney at law and solicitor. The disbursements which will be required of you to enable you to arrive at this happy state are as under :—

	£	s.	d.
On leaving articles at the office for inspection	0	10	0
Examiners' certificate	2	2	0
On taking away original affidavit of execution of articles	0	2	6
On swearing affidavits	0	5	0
Judge's clerk for fiat	1	3	0
Mr. Aldridge for admission stamp, and for swearing at Westminster	25	10	0
Queen's Bench usher on signing Roll	0	6	0
Common Pleas do. do.	0	5	0
Exchequer do. do.	0	5	0
Secretary of the Rolls on leaving admission	1	17	0
Bankruptcy admission	0	6	0
	<hr/>		
	£32	11	6

CORRESPONDENCE.

Descent—Half-blood (Supp. 69, 123).

GENTLEMEN,—I think there can be no doubt that your correspondent, J. R. S., is correct in his opinion upon this point, as stated in the last number of your magazine. Indeed, upon recurring to the subject just previous to the period of publication of your last number, I was struck with the same view your correspondent has taken. My thanks are, nevertheless, due to him as well as to yourselves for giving attention to the question.

I would now beg to submit another point which has occurred to me upon the subject of descent, with reference to the recent Inheritance Act, and which, perhaps, it would be well to put in the following form :—

Descent—Purchase.

B. having inherited lands from A. (the purchaser) since the 3 & 4 Will. 4, c. 106, came into operation, made a lease to C. for life, and died intestate ; from whom is the descent of the reversion on the life estate of C. to be traced ?

It will be observed that under sect. 1 of the act, the word "land" includes any estate of inheritance in possession, "reversion," &c., and

the word "purchaser," from whom (under sect. 2) the descent is to be traced, is defined to be "the person who last acquired the *land* (or *estate in reversion*) *otherwise* than by descent, &c." Now, it is submitted that the *reversion* in the above case was acquired *otherwise* than by descent; although it must be admitted that *de hors* the statute, it was not acquired by purchase. But if by the statute it was an acquisition by purchase, then *en bono* the latter clause in the 3rd. sect. of the act, *declaring* that to be a purchase, which before the act was in effect (at least, where the whole estate did not pass from the grantor) the creation of a reversion.

I shall be glad to have the opinion of yourselves, or some of your readers upon the point.

I am, &c., G. S. (New Broad-street, City.)

Descent—Half-blood (Supp. p. 123).

GENTLEMEN,—Through a want of clearness in expressing my meaning, you have, I perceive, mistaken it, and made me to say that on the death of the brother of the whole-blood the purchaser's paternal line necessarily fails, and I therefore write to express my concurrence in your statement of the law on the point. If the sentence concluding my remarks had run "as the brother of the whole blood must be dead, ere any claim on the part of the maternal ancestors could by any possibility arise," your correction would not, I think, have been needed; as it is, I feel obliged, and remain,

J. R. S.

MOOT POINTS.

No. 54.—*Legacy charged on Land—Vesting of.*

A. devises to his son B., in fee, 20 acres of land, chargeable, nevertheless, with the payment of £50 to his son, J. C., his *executors* and *administrators*, to be paid to *him* at the end of one year next after the decease of testator's wife. J. C. survived the testator, but died before the wife.

Are the representatives of J. C. entitled to the legacy, or does it sink into the land for the benefit of the devisee?

G. P. (Witham.)

No. 55.—*Agreement—Lease—Stamp.*

A., by writing, "agrees to let," a messuage and lands to B. for one year at the "yearly rent of £100."

Is such document liable to an *ad valorem lease* stamp or (as it does not exceed 15 folios in length) would a 2s. 6d. agreement stamp suffice?

J. BRAUMONT (Witham).

No. 56.—*Devise—Entail, &c.*

A. B., by his will, devises to C. D. for life, and his heirs, certain property. but in default of issue of the said C. D. he devised the same to E. F. C. D., for his own purposes, executes a deed *disentailing* the property. He is now dead, and E. F. claims the property under the will.

Query—Is the disentailing deed effectual against the devise in the will to E. F.?

Personal communication on the above would much oblige.

G. CRUMP. jun. (Greatfield House, Kidderminster).

No. 57.—*Bankruptcy.*

A. was insolvent in 1837, and obtained his discharge, not paying 20s. in the £1. In 1849 A. became also bankrupt, and obtained his certificate, also not paying 20s. in the £1.

Query—Is that certificate a bar to the creditors under the insolvency as well as the bankruptcy as regards future assets, the creditors of the insolvency not being able to prove under the bankruptcy?

WILLIAM CHUBB.

ANSWERS TO MOOT POINTS.

No. 20.—*American Certificate—Whether a Bar to English Debts*
(No. 4, N.S., p. 57).

If the cause of action accrue in England, a certificate abroad is no bar here (see Montagu and Ayrton, 2nd ed., v. i., p. 721). The American certificate would not, therefore, be a bar to English debts. The cases cited in Mon. and Ayr. are *Quin v. Keefe*, 2 H. Bl. 553; *Pedder v. M'Master*, 8 Term Rep. 609; *Smith v. Buchanan*, 8 East, 6; *Potter v. Brown*, 5 East, 124; *Burrows v. Jemino*, 733.

J. A.

No. 3.—*Title Deeds.*

In Sug. V. and P. (6th edit) it is laid down, "If a purchaser cannot obtain the title deeds, he is entitled to attested copies at the

expense of the vendor, unless there be an express stipulation to the contrary," but not of instruments on record. If a vendor sells an estate, and there is no covenant to produce the deeds, the purchaser is entitled to them (*Fair v. Ayres*, 2 Sim. and Stu. 533). If a vendor has occasion for them, and there is no express grant of them in a conveyance he is entitled to retain them (*Yea v. Field*, 2 T. R. 700). In p. 450 of Sug. V. and P. the same case in effect is put, and it is said, "I should conceive the practice to be for the vendor to enter into the usual covenant for production of the deeds in his possession, which, of course, would include the original covenant to produce the deeds."

The seller, in the absence of an express stipulation to the contrary, is bound at his own expense to furnish the purchaser with attested copies (Sug. V. and P. 448; *Boughton v. Jewell*, 15 Ves. jun. 176; *Berry v. Young*, 2 exp. 640 note; *a fortiori*, then, when he expressly covenants for title, see also *Southby v. Hutt*, 2 My. and Cr. 207; also *Cooper v. Emery*, 10 Sim. 609). Here, then, the vendor is bound to furnish the purchaser with attested copies.

Even of instruments on record, he is bound to produce attested copies to compare with the abstract delivered, and afterwards the purchaser is entitled to them (Sug. V. and P.; and see 1 Sug. V. and P. (10th edit.) 110; 2 Sug. V. and P. 116; *Berry v. Young*, 2 Esp. 640, note; *Campbell v. Campbell*, cited 2 Sug. V. and P. 116).

W. B. I.

No. 32.—*Devise—Lapse—Conversion.*

The share which B. would have taken must be considered as part of A.'s *real* estate, as the *subject-matter* (which is real estate) of the devise to B. remains undisposed of by the will (1st ed. Stephen's Commentaries, vol. 1, p. 559) to which the heir-at-law is entitled. In *Ackroyd v. Smithson* (1 Bro. C. C. 502) testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies to be paid, and the residue to certain legatees in the proportion of their legacies. Two of the residuary legatees died, living the testator. It was held that these shares were lapsed, and so far as they were constituted of real estate should go to the heir-at-law. In this case Lord Thurlow said, that he used to think, when it was necessary for any of the purposes of the testator's disposition, to convert land into money, that the undisposed of money would be personalty; but the cases fully proved the contrary. J. D. LONG.

NOTE.—We received an answer to a similar effect from another correspondent, but he subsequently wrote us that on further reading he found the answer to be incorrect. We should have been glad to have received the reasons for this alteration of opinion, and in the hope of yet doing so, and of receiving other answers to this really im-

portant question we refrain from stating our opinion. There is a distinction to be taken, and there is also a principle not touched upon by either correspondent which would decide the point, and we hope they will not be overlooked.—Eds.

Since writing the above we find we have an answer from W. P. M. in which the distinction is stated, but we are not quite sure that the principle he states is the correct one.—Eds.

No. 21.—*Dower Conveyance* (V. 1, N. S., Supp., pp. 57, 94).

I cannot coincide in the opinion expressed by P. W. on this point. Before the Dower Act, where a person executed a mortgage of his estate, and his wife joined in levying a fine to the use of the mortgagee in fee, in this case, if he wished afterwards to make a further disposition of the estate, it was questionable whether another fine was not necessary, for, as the mortgage was made after the marriage, it was reasonably contended that, as the fine was levied for a particular purpose, it should not operate in equity further than was intended, and for this the cases of *Delin v. Colman*, 1 Vern. 249, and *Jackson and Parker, Amb. 587*, are authorities in some degree. To prevent this doubt it was deemed expedient to limit the equity of redemption to such uses as the husband and wife should jointly appoint, and, in default of appointment, to such uses as the parties agreed upon. So much for older authorities and the practice of conveyancers. I would now only refer to the recent case of *Clark v. Burgh*, 9 Jurist, p. 679, as establishing, beyond a doubt, that the wife would, *unless a contrary intention appears*, be entitled to dower.

I have been favoured with an extract from the mortgage deed of which the following is, in effect, a copy:—"And the said A., the wife of the said B. C., to the intent absolutely to release all dower, and right to dower of, or to which, she is, or may be, entitled out of or upon the hereditaments, &c., and all other, if any, her right, title, claim, or demand therein or thereto, and with the consent, &c., doth release, &c."

I consider that the above extract does not show *any intention whatever* of releasing the right to dower in respect of the *equity of redemption*; consequently, the wife is still entitled to dower thereout, and it would be necessary on a purchase from the mortgagor that she should acknowledge the deed. However, I think this would be unnecessary if the mortgagee concurred in the conveyance, and the mortgage debt was assigned to a trustee for the purchaser as a subsisting charge (see *Law Stud. Mag. v. 6, p. 75*).

As several gentlemen take a different view of this question, perhaps you will be so kind as to correct me if I am wrong.

G. B. HAYWOOD (Basingstoke).

ON THE LAW OF FIXTURES.

Questions frequently arise on the termination of a tenancy about the ownership of property placed on the premises by the tenant during his term. This property is either "*fixtures*" or "*chattels personal*;" and whatever is not comprehended in the definition of the term "*fixtures*" is a chattel personal, and clearly removable by the tenant without his landlord's consent. A fixture is defined to be anything annexed to the premises: if it has been annexed by the landlord, it of course belongs to him. The following remarks, therefore, only apply to things annexed by the *tenant* to the premises. Before proceeding further with our subject, we must endeavour to obtain an accurate notion of the word "annexed," otherwise we shall not be able to comprehend the term fixture, nor shall we understand the difference between a fixture and a chattel personal. When anything is said to be annexed to the premises, or, technically speaking, to the freehold of the landlord, it is understood to be not merely placed *on* the land, or *against* the house or wall of the landlord; but it must be let *into* the soil, or *fastened* to the wall, or house, or other fixture—for things may become fixtures by being annexed to fixtures, as well as being annexed to the house itself; and thus there may be a series of fixtures which do not immediately touch the wall, house, or soil of the landlord. To illustrate this definition, let us suppose that a tenant erects a barn, which is not built in the soil, nor fastened to the house or wall, or any other part of the premises, *but which merely rests upon the ground*: this has been decided to be a chattel personal, and to be removable by the tenant against his landlord's will, because it is not *annexed* to the premises. Again, suppose that a tenant fastens a closet or anything else to the wall, floor, or other part of the premises, or builds a summer house in a garden, so that it is partly let into the ground, both are fixtures—the closet, though it is held by a single screw or nail, and the summer house, although one post only is placed in the ground. And here I may remark, that the size or importance of the thing has no effect upon the question, whether or not it is a chattel personal. It ought here to be noticed, that there is a kind of constructive annexation, by which certain things, such as keys, are held to be fixtures, though they are not actually annexed to the premises, but this is in accordance with the legal maxim that "*accessories follow their principals*;" and as locks, which are the principals, are undoubtedly fixtures, so their accessories, their keys, become so; and, to show a further illustration of the principle, we may add, that the keys of padlocks are not fixtures,

because neither they nor the padlocks themselves are annexed to the premises.

Having endeavoured to give a clear notion of the term "fixtures," I will proceed to show what fixtures are removable by the tenant against his landlord's will, and what belongs to the landlord and are consequently irremovable by the tenant. It would be amusing as well as instructive to trace the law of fixtures from the time when the feudal system prevailed, under which form of government the rights of the tenant, or, as he was then called, the vassal, were not recognised; but such a sketch would occupy more space than is consistent with the nature of this article. Let it suffice then to remark, that previously to the reign of Edward III. all fixtures belonged to the landlord, and the tenant had no power to remove them without subjecting himself to penalties; and this is still *the general rule*, although very many exceptions have since been allowed. When England began to manufacture articles of commerce, and carry on trades, it was soon apparent that the strictness of the law of fixtures retarded the operations of the mechanic and the trader, and worked banefully upon the commerce of the country; on this account the first exception to the strictness of the law of fixtures was allowed, and it may now be considered as settled law that all fixtures erected by the tenant *for the purposes of trade* are removable by him, although the decisions have not yet gone so far as to authorise a tenant to remove substantial brick and mortar buildings, which could not be removed in a whole state, even though they be erected for the purposes of trade; but if such a building can be taken away without great injury it may clearly be removed. A building erected over an engine may be pulled down if the engine could not be otherwise removed. Another instance of fixtures rendered removable by the relaxation of the rule in favour of traders is that of trees, shrubs, and other produce of a nursery ground, planted with a view of sale, which may be removed, although private individuals are not at liberty to remove even flowers.

Notwithstanding the liberality of the decisions in favour of tenants who have erected fixtures for the purposes of trade, it was laid down in 1802, by Lord Ellenborough, that fixtures erected by *agricultural* tenants, such as a beast-house or waggon-house, were not removable; and although it is difficult to see the principle upon which this decision was founded, yet it must be considered as explanatory of the present law, since the judgment was given after much deliberation. It has, however, been more than once hinted, that should a similar case come before the courts, they would probably feel inclined to deal more favourably with the agricultural tenant.

There are mixed cases of fixtures, that is, of fixtures which are *partially only* used or erected for the purposes of trade; and in such

cases it must in the first instance be determined whether the usage or non-usage of these erections for the purposes of trade preponderates, and an opinion formed accordingly. Thus, in the cases of fixtures which partake of the nature of trade fixtures, and also of agricultural fixtures; if they partake in a greater degree of the former kind, they must be judged according to the law of trade fixtures; and if of the latter kind, according to the law of agricultural fixtures. In accordance with this rule, it has been decided that a beast-house, erected by a butcher for the purpose of his trade, is removable, although it partakes in some degree of the nature of an agricultural building, while, as we have before noticed, if it be erected chiefly for the purpose of agriculture, it cannot be removed by the tenant.

Another exception to the strictness of the general law of fixtures is, that when a tenant erects them for the purpose of ornament or domestic use and convenience rather than for the general improvement and completion of the estate, they are removable by him. The reason of this exception is evident, for were the law otherwise, either the landlord would at his own expense have to erect fixtures, such as pier glasses, &c., which some tenants might like to pay for, and others not; or the tenant would occupy the premises without enjoyment, because he could not put up certain fixtures, unless he was willing to relinquish all right to them. The following list contains many of the articles of an ornamental or convenient nature which form the exception we are now discussing, and which are removable by the tenant:—Pier glasses, marble or mahogany alabs, window-blinds, *marble* or other *ornamental* chimney-pieces, grates, ranges, and stoves, iron chimney backs, beds fastened to the ceiling, wall, or floor, book-cases, bells, fixed tables, furnaces, coppers, pumps, iron fences and hurdles, mash-tubs and water-tubs, coffee-mills, malt-mills, jacks, cupboards fixed with holdfasts, clock cases, iron ovens, and the like, shelves, cabinets, dressers, presses, bins, cisterns and sinks, iron chests, turret and other clocks, lamps, and articles of a similar nature and construction. It must not be supposed that the above list contains *all* the fixtures that are removable by the tenant; those enumerated are those only which have been decided to be removable by law or custom. The principle upon which the decisions on the exception now under discussion are founded is this:—The estate, which belongs to the landlord, is complete without the articles named, which are erected only for the purpose of ornament or convenience; for instance, a house is complete without pier-glasses, cupboards, &c. These articles are only erected for the use and convenience of the tenant; the removal of them does not injure the house. But suppose a tenant enters a house in which there are no windows, or in which there is no stair-

case, but merely a ladder, and he choose to put in windows or build a staircase, he would not be allowed to take away the one, or destroy the other, neither would the landlord be bound to allow him for them, *because* the house was incomplete without them. The example of windows will clearly show the principle of the exception we are now discussing. Formerly, in the time of the Tudors, they were not considered as part of the house, which was thought complete without them; for example, when the Earl of Northumberland, in the reign of Queen Elizabeth, in 1573, left Alnwick Castle, the windows were taken out of their frames, and laid carefully by. Then they were, therefore, held to be the property of the tenant; but, *tempora mutantur*, a house is now considered incomplete without windows, which belong to the landlord, although the tenant has put them in at his own expense. The custom of the district in which disputed fixtures happen to be has in all cases much influence with the courts of judicature, who are also sometimes guided by the injury which will be done to the premises by the removal of them.

Fixtures, I should add, are not liable to be seized under a distress for rent, because, as a distress was anciently no more than a pledge in the hands of the landlord to compel payment of the rent due to him, it follows that those things only of which manual possession can be had are distrainable. Fixtures are liable to be seized in execution under legal process.

It is a popular error to suppose that if a tenant leaves premises in the same condition as they were in when he entered, he is in every case exempt from liability, because immediately an irremovable fixture is erected it becomes the property of the landlord as much as if he himself had placed it there. When a person mortgages his estate, he may not remove fixtures without the mortgagee's concurrence.

The landlord's remedies for a breach of the law of fixtures are either by action or application to the Court of Chancery for an injunction to restrain the tenant from removing the fixtures. An injunction will not be granted unless very clear evidence of the tenant's intention wrongfully to remove fixtures is given. Of course the law may be varied by any special agreement between the parties for *modus et conventio vincunt legem*; but a tenant must bear in mind that a mere parol permission by his landlord to remove fixtures will not protect him from an action where a covenant exists, unless in the covenant a stipulation is inserted that permission may be given. In such cases, before removing fixtures, he should have a permission in writing, *signed and sealed* by the landlord.

I ought to add, that questions on the removability of fixtures arise between three different classes of persons: Firstly, between the

landlord and tenant; secondly, between the tenant for life and the person entitled to the estate on his death, or his successor; and thirdly, between the executor and the heir or devisee of the owner of the property. It is said that the law of fixtures is construed most liberally in the first of these classes or relations, and most strictly in the last, although in practice there seems to be but little difference in the administration of the law in the first and second of the above classes.

Respecting the time when the tenant ought to remove the fixtures claimed by him, if the landlord or in-coming tenant do not choose to take them, he ought to do so *before* the termination of his tenancy, in cases where he knows when the termination will take place, as on the expiration of a lease, or the end of a notice to quit; if he does not remove them before that time, he will not be allowed to do so at all—they will belong to the landlord. The landlord will not, however, be allowed to take advantage of this rule of law by pretending to be anxious to take the fixtures at a valuation, and so fraudulently inducing the tenant to permit them to remain until his tenancy has expired. Where the termination of the tenancy is uncertain, as where a man is tenant during his own life, or during that of another person, he or his executors will be allowed a reasonable time after the termination of the tenancy in which to remove fixtures; they will cease to belong to him if he do not remove them within such reasonable time. What is a reasonable time will vary with almost every case, and that is a question which, in case of litigation, would have to be decided by a jury.

In closing this article, I will take the liberty of adding a few words of advice to both claimants of disputed fixtures. To the landlord I would say, that, although the recorded decisions are much in his favour, he will do well to recollect that the judgments of the courts are daily becoming more liberal, and that a tenant's rights are now by law regarded equally with the landlord's, whose interest formerly was the only one recognised; and to him I would add, that he will do wisely in acting towards his tenant with liberality. To the tenant I would give a caution, that, however just his claims may appear to be, and however willing the courts may be to assist and protect him, they are greatly bound by their previous decisions, and always feel disinclined to upset any construction which has formerly been given to the law. Both parties I would advise to settle their disputes, if possible, between themselves, or by arbitration, bidding them recollect that the decision of a court of law is often unsatisfactory, and always expensive.

I cannot conclude without acknowledging the assistance I have derived in writing this article from Mr. Amos's valuable treatise on the "Law of Fixtures," a perusal of which I would strongly recom-

mend to any one desirous of obtaining a further insight into that particular branch of the law.

ROBERT ARTHUR WARD.

ON THE LAW OF COVENANTS.

[Continued from *Supp.* p. 138.]

No implied covenant by stranger to estate.—There is another rule, and an important one, respecting implied covenants, namely, that covenants arise by implication of law only against or in favour of those who have the legal estate. Those who are strangers at law to the lessor cannot make a legal demise, and therefore it follows that the law cannot imply a covenant by them. This is the reason why a mortgagee and the owner of the equity of redemption should both join in the lease, using the word “demise;” as the law cannot notice the owner of the equity of redemption as a party to the demise, it is only the confirmation of the mortgagor, at least during the mortgagee’s interest, and there cannot be any implication of a covenant against the mortgagor. It is an implied covenant against the mortgagee, but not against the owner of the equity of redemption. If the owner of the equity of redemption be joined in an action on such a covenant, the action will fail. (*Smith v. Pocklington*, 1 Crompt. and Jerv. 445; *Broom’s Part. Act.* 37, 113, 114, 128). In the case just cited, it appeared that by indenture of lease made between the defendant A. Pocklington, *mortgagee* in fee of the demised premises, of the first part, the defendant H. S. Pocklington, *mortgagor*, of the second part, J. J., a trustee, of the third part, and the plaintiff, the lessee, of the fourth part, A. Pocklington, at the request and by the direction of H. S. Pocklington, did demise and lease certain premises, with liberty to make wharfs and quays thereon, &c. The lease contained a covenant for quiet enjoyment by the defendant H. S. Pocklington only. The plaintiff being prevented from making a wharf as contemplated by the lease, on account of a prior demise by the defendants to one Meager of another dock, covering nearly all the frontage of the land demised to himself, brought a *joint* action against A. and H. S. Pocklington, charging, that at the time of making the said indenture, the defendant and the said J. J. had not in themselves, or in any or either of them, any right, power, or lawful authority, to demise to the plaintiff the liberty above mentioned. At the trial the plaintiff was nonsuited. A motion was subsequently made to set aside the nonsuit, but was refused on the ground that as the *express* covenant was by the mort-

gagor only, and neither the lease, lessors, or covenant appeared to be joint, but on the contrary, the demise was incapable of being construed otherwise than as a separate lease from each of the defendants, a joint-covenant for quiet enjoyment arising from the word "demise" could not be *implied* against the *mortgagor and mortgagees*.

Relief in equity.—We may now direct our attention to the position of the parties in courts of equity, where the contract is altogether for property real for valuable consideration. Let us suppose a conveyance of the property contracted for, and that, consequently, the relation has become a legal relation by virtue of the assurance. It may be expressed to be free from rights of way, &c. Suppose that the grantee afterwards finds that the thing conveyed was not of the precise value or not free from claims of rights of way. If there were anything in the deed incompatible with the existence of those rights, the grantee could have a remedy at law, but if this is otherwise, as in the case of trustees who do not covenant, relief will be given in equity. There is, indeed, no implied covenant in virtue of the contract for sale and conveyance, but the question is, whether there is anything analogous to such a covenant. Suppose the vendor has conveyed to the purchaser less in quantity or quality, and of which the purchaser could not have easily informed himself. It is clear that this conveyance may be set aside, because there has been that which amounts to fraud in the view of a court of equity; if the purchaser comes in due time to set aside the conveyance, and if he ask to have back his purchase money, equity gives it him, and the vendor may take back the estate. In fact, there is in equity an implied covenant that the thing conveyed is what it has been represented to be.

Words operating as covenant or condition.—In concluding the subject of implied covenants, we have to mention a rule of courts of law bearing upon the whole of what has been previously stated. As if there be a clause so ambiguously expressed as not to be a covenant, but it will operate as a condition, it shall not be a covenant. Suppose there is an assignment of a lease, subject to the payment of rent and performance of the covenants, if the clause is so expressed as to be simply a qualification or restriction, it would be an absolute assignment. The clause of assignment may be to hold to the assignee and his executors, subject to the payment of rent and to the performance of the covenants, or it may be to hold to the assignee subject to the payment of rent, &c., by him and his executors, or he and his executors, paying the rent and observing the covenants. The first form is so very remote from being a personal liability in the assignee, that in fact he is not absolute assignee, but only subject to charge on land, but if the second form be used, then it is very different. This is an instance of a covenant to do something, and it cannot be got rid of,

even after assigning. In the other case, the assignee would get rid of his liability, he being assignee of the lease subject to paying the rent merely. It is a covenant if expressed personally in the assignment, if it do not merely refer to the land; but it is not a covenant when it merely affects to charge the property. It may be either condition or assignment, or it may be both. It is very common when we intend to throw upon the lessee the burden of performing the covenants personally, to take care to express the clause so as to fix him personally, not merely saying subject to payment of the rents and performance of the covenants, but stating that the assignee and his executors shall pay the rent, &c., or it may be to hold by the said assignee, *he* and his executors paying the rent and performing the covenants.

Effect of executing covenants.—We are now to consider what are the effects of entering into covenants. We are to assume that every one who is a covenantor executes the instrument containing the covenants, otherwise there would not be any covenants. What results from the fact that the covenants are entered into? The particular aspect under which covenants are now being considered by us is its creation of an obligation, its constitution as an obligation, its consequences viewed as an obligation merely and not as an *assurance*.

Lien of covenant.—The lien of a covenant is that part which states who covenants or who is party; that is, who are bound by the covenants, or on whom they are to be a burthen. No one is bound merely because he is named, unless by virtue of having under seal agreed to do or convey a particular thing. Its office is one of stipulation, to determine what is the mode in which the agreement of the parties is to have effect. Thus, if A. covenants that B. shall surrender his estate by indenture to C., his lessor, the purpose of the covenant is to surrender, and B. is the object to do this, but upon whom rests the burthen of the obligation? Not upon B., as some one else promised for him, that is, A. promised, and that part of the covenant is called the lien. It is not because it is desired, or agreed that a particular person shall perform a particular act, that that person is bound. This point as to who is to be bound by the covenant, is distinct from the question who is to do it. The lien of the covenant should be confined to the person who is to be bound. Thus, in the case above supposed, it would be utterly incorrect to covenant that B. should surrender the lease; indeed, it would be endangering the remedy at law. If a married woman is entitled to land, and her husband enters into a contract for the sale thereof, the object cannot, or rather could not formerly, be accomplished without a fine. The wife could not effectually engage herself to levy a fine, and therefore it is right that the husband should covenant for himself and wife. This depends upon

the question whether by virtue merely of the covenants the husband would be bound. If not, it is wrong to say in the lien that the husband covenants for himself and his wife. The husband cannot by merely binding himself by covenants bind his wife also. The assurance is to be the act of the wife, and therefore if the husband by covenanting could oblige her to do the act, it would be violating the law. If by covenanting he bound her, it would be the same thing as doing the act itself. By joining the wife's name in the lien of the covenants, he affects to bind a person whom he cannot bind. It is therefore, in such case, wrong to so covenant. The husband should in the body of the deed covenant for himself, his heirs, executors, administrators, and assigns, that his wife shall levy a fine, and then if she refuse, the party will have a remedy against the husband, or his representatives, for breach of the covenant. The general rule is that those only should be named in the covenants whom the deed would of its proper force bind. There is an exception to this on the rule of equity, as to covenants running or not with the land. Suppose the covenant would not run with the land, would it be of any avail to name the assignee in the lieu of the covenants? There are cases in which equity holds that though the assignee is not bound at law, yet if the assignee has notice of the covenant in the deed creating it, he is bound, if named in the lien, on the ground of notice (*Mann v. Stephens*, 15 Simons, 377; S. C. 10 Jur. 651; see also *Tulk v. Moxhay*, 13 Jur. 26, 89).

Use of covenants.—The use of a covenant is two-fold: 1st, to afford a right to damages at law on a breach; 2ndly, to give a right to specific relief. This division flows from the differences between the jurisdiction of courts of law and of equity. We shall here consider the effect or consequence of covenants—1, at law; 2, in equity; 3, in bankruptcy and insolvency.

Consequences of covenant at law.—Firstly, the effect or consequences of a covenant at law. If a covenant be not performed there accrues to the party a right to have it performed. There must be a damage suffered. The party suing will fail if there is no breach, or if there has been a breach yet it has not led to any damage. Where, indeed, there has been a damage, though only a nominal one, the party will be entitled to nominal damages. A covenant does not, at law, effect anything more than a personal charge on the individual entering into it. It is only during his life that there is a personal liability merely to determine not only the relative rights of the covenantor, but also the relative rights of the covenantee, and all other persons claiming under the covenantor. There is an important distinction that the law, though it does not make the covenant a charge upon the property of the covenantor in his lifetime, yet does make it a charge upon his property to some

extent after his death. A specialty in which the heirs are named will bind the heirs of the covenantor. Thus, then, in considering the effect of a covenant in a court of law, it is important to distinguish between its effect as to the real and the personal representatives. Let us examine in what the difference consists. The executor must satisfy covenants before simple contract debts; at least, if the executor have notice of the existence of a covenant, he cannot pay a debt of lower rank. The executor can never, in such case, get rid of his liability, except by having paid debts of equal or greater degree. There is a single exception, and that is where the executor administers the estate under the direction of the Court of Chancery. In such a case equity would restrain a creditor, who should sue the executor for a debt. Therefore, the party entitled to enforce the covenant has a right against the executor in preference to simple contract debts, if the executor have notice of the covenant. This is the prevailing opinion on the subject.

Assets not specifically liable for debts.—It is a rule that it is the executor who is liable to the creditors, and not the assets themselves—i. e., the assets are not specifically charged with the liabilities. There is one case which may seem to be an exception, but in truth it is no exception. The case alluded to is that of a creditor entitled under the 13 Eliz. c. 5. The creditor may have the benefit of this statute, both in the lifetime of the party and after his decease. Suppose the fraudulent deed be the assignment of a lease, an ejectment may be brought; if not, then the value may be sued for. This is a case in which the creditor may come against the thing itself, but then it is not against the executor *quod* executor, but against the person in possession under the fraudulent deed.

Real estate liable to covenant after covenantor's death.—As to the real estate of the deceased covenantor. The covenantee has a right to proceed against the real estate when the lien of the covenant comprehends the heirs, and also against the devisee; and it makes no difference whether they have made away with the lands or not. They are still liable to the full value, whether or not they received full value, and whether or not the person who took the estate had notice. However, the covenantee has only a right to be satisfied by the heir or devisee, and has not a right to recover from the alienee the specific property. In fact, no part of the estate is specifically bound so as to prevent the sale of it. However, it is different where the heir or devisee makes a mere *voluntary* settlement of the land; for in such a case it will be subject to the liabilities of the deceased owner; as against those who claim under the voluntary deed the creditors may sustain their demands. As the law now stands there is no difference whether the covenant be broken at the time of the death or not. The rule was formerly different under the 3 & 4

Will. and Mary, c. 14, but the 11 Geo. 4 and 1 Will. 4, c. 47, s. 6, rectified this (see *Morse v. Tucker*, 5 Hare, 79; S. C. 10 Jur. 173; 15 Law Journ., N. S., Chanc. 162).

Party entitled to enforce covenant.—As to the effect of a covenant at law, we have only to add, that the party who can enforce the covenant is the covenantee, or those to whom the right is transmitted, as his heirs or executors. The stipulation may be in favour of a stranger, as the covenantee may be merely a trustee, but it is not merely the person who is interested, but the individual with whom the contract is made, that is the party to enforce the covenant. Is, then, the party who is entitled to the benefit of the covenant remediless, or, at least, at the mercy of the covenantee at law and in equity? No; for the party beneficially interested may use the name of the covenantee for the purpose of enforcing the covenant. And this is so at law, but then the court will order a suitable indemnity against risk (see *Fletcher v. Fletcher*, 4 Hare, 67; S. C. 14 Law Journ., N. S., Chanc. 66).

MOOT POINTS.

No. 58.—*County Courts—Set-off—Defence.*

A. B. sues C. D. in the county court for £10 for goods sold and delivered. The defendant admits £7—part of the debt sued for, but denies altogether the remaining £3. Moreover, he claims a set-off of £5. He therefore gives notice to the clerk of the court of his set-off, delivers the particulars thereof, and pays £2 into court, thus making up the £7 admitted to be due.

Under these circumstances, can the defendant dispute the remaining £3 at the trial of the cause, or is he barred from so doing by having given notice of a set-off; or, in other words, does the pleading a set-off in a county court bar a defendant from defence to the amount of the plaintiff's claim exceeding such set-off?

I beg to submit as my own opinion on this point, that the defendant is still at liberty to dispute the excess of the plaintiff's claim. And I am led to hold this opinion on three grounds:—

First. The defendant having paid £2 into court, and given notice of his set-off to the amount of £5 against a claim of £10, it follows almost as a matter of course that he *intends* to dispute the remaining £3—or why leave it unpaid? And if that intention is evident (to the plaintiff) I think there can be no doubt that it is open to the defendant to dispute the £3—the only reason for a *notice* of set-off or any other special defence in the county courts being, that the

plaintiff may be aware of the defendant's *intended* defence, so as to be able to meet it, &c.

Secondly. I think that the form of the notice, by the clerk, of the set-off annexed to the rules of practice, further supports this view. It is as follows: "The defendant has given notice that he will, at the hearing of the cause, claim a set-off against any debt or demand to be *proved* against him by you." Now, it is not stated that the defendant will claim a set-off against "the amount sued for in this action," "your claim against him," or anything of the kind (though I do not mean to say that even then defendant would be barred from other defence), but it is "against any debt, &c., to be *proved* against him by you." The plaintiff, therefore, has to prove his debt, and it is that very proof which defendant disputes.

And thirdly. I think that this view is still further confirmed by drawing an analogy between proceedings in the county courts and those in the superior courts. The summons in the former is analogous to a writ and declaration in the latter, and the defendant by simply appearing at the court pleads the general issue to the counts in the summons. But he must give notice to the clerk of any set-off or other special defence just as in the superior courts he would have to plead such defences specially. By appearing then in the county court in the circumstances stated, he would be just in the same situation as a defendant in a superior court having pleaded the general issue with special pleas of payment of money into court and set-off, and would be able, under the general issue, that is, by appearing at the court, to dispute the excess of plaintiff's demand.

I know several persons who hold opinions contrary to the above, chiefly on the ground that having once given notice of any particular defence, a defendant is confined to that; or, in other words, that having once entered into written pleadings, he cannot travel beyond them; and they propose to obviate the difficulty by delivering to the clerk with the particulars of the set-off short pleas of payment into court of £2, set-off as to £5, and as to the remaining £3, non assumpsit. This, I admit, can do no harm, but I consider it totally unnecessary, and I am sure the low rate of remuneration allowed attorneys in the county courts is a good reason for avoiding all unnecessary trouble.

I have sent this opinion, contrary to general custom, with the case, in the hope of receiving from some of your correspondents opinions either in confirmation of or opposition to my own, as this is a case of great practical importance, and one on which no doubt should be entertained.

T. H. WAITE (Louth.)

No. 59.—*Copyhold—Advancement for Grandchild.*

A. B. deceased, in his lifetime purchased certain copyhold estates

which in order to save the expense of admittance at his death, were surrendered by his direction to his grandson, C. D.; admittance was afterwards taken to these estates, by A. B. in C. D.'s name, and *A. B. having paid the fine and fees, remained in the possession of the estates till his death*, when C. D. supposing the estates, which were so surrendered, had been purchased for his benefit, took possession of the same. It should be mentioned that these estates were purchased by A. B. *in the lifetime of C. D.'s father*.

Would the purchase of these estates be considered as an advancement for C. D. the grandchild, *without the support of parol evidence?*

A. K. W.

No. 60.—*Mortgage—Second Incumbrance.*

A. mortgaged his property to B. for £500, *without* a power of sale; a few years after A. made a second mortgage to C. for £100, which deed contains the usual power of sale: C., wishing to be paid off, exercised the power without the consent of B., and the property realised only £400.

Can B. compel C. not only to pay him the £400, *but also to make up the deficiency of his prior mortgage?*

A. K. W. .

ANSWERS TO MOOT POINTS.

No. 32.—*Devise—Lapse—Conversion* (p. 70).

Assuming that B. died without leaving issue surviving him (because if such were the case, the 1 Vict. c. 26, s. 33, would at once decide the question), I think the case suggested by Mr. Beaumont falls within the scope of the authorities of *Jessop v. Watson*, 1 M. and K. 667; *Eyre v. Marsden*, 2 Keene, 574; and *Wright v. Wright*, 16 V. J. 188; and the recent cases of *Fitch v. Weber*, 12 Jur. 645, and *Flint v. Warren*, 12 Jur. 810, and that the share of B. would devolve upon A.'s heir-at-law as an undisposed-of interest in real estate.

But a question also arises on the case, as to whether such share would come into the hands of the heir-at-law of A., as realty or personalty, and I think that the case is governed by *Wright v. Wright*, before quoted, and *Smith v. Claxton*, 4 Madd. 493, and that the share of B. would, therefore, go to A.'s heir-at-law as personalty, that is, in case the heir-at-law should die before the estate fell into possession (as for instance before the sale was

completed), it would be payable to his personal representatives, following the rules laid down by Sir J. Leach in *Smith v. Claxton* :

That where a *partial* undisposed-of interest in real estate directed to be sold, results to the heir-at-law, it becomes *personalty* in his hands :

But where the purposes of the will wholly fail, it will devolve upon the heir-at-law as realty.

W. P. M.

No. 32.—*Devise—Lapse—Conversion* (p. 70).

The answer to this moot point, which I sent you some time back, containing my opinion that the intended share of B. lapsed by his death in the testator's lifetime, must be considered as part of A.'s real estate, on the ground that A., the testator, died intestate, *tanto quanto*, B.'s share, on which event the heir-at-law of A. became entitled to such lapsed share. But, on further considering and reading on the subject, I wrote you not to insert my said answer, which I perceive you notice in your last number. In Hayes and Jarman's "Practical View of the new Stat. of Wills" (H. and J.'s Concise Forms of Wills) p. 26, is the following passage :—"Under the new law if a devisee in fee of specific lands die in the testator's lifetime, the estate comprised in such lapsed devise, instead of devolving on the heir, passes to the residuary devisee (s. 25) ; and so, generally, the property or interest comprised in every devise, lapsing, or incapable of effect, from any cause whatever, falls into the residue of the realty." This it was that induced me to alter my opinion. But, I think now, without reason, for, in the case put in this moot point, there seems to be no residuary devise, and certainly no specific lands mentioned ; the words are "*all his real estates.*" I therefore maintain my original opinion that, as the testator died intestate, so far as respects B.'s intended share, the heir-at-law of A. is entitled to it. Of course the trust for sale cannot convert it into personalty, as, by B.'s decease, the devise to him must totally fail. I trust I have now mentioned the distinction and the principle you mention as having been overlooked by Mr. Long and myself ; if not, I hope either yourselves or some other of your correspondents will at last give a correct solution of this important question.

ROBERT W. HILLMAN.

No. 53.—*Copyholds* (Supp. No. 8, N. S., p. 125).

I am of opinion that the surrender of a copyhold tenement to one of two tenants in common of the manor, does not work an extinguishment of the copyhold tenure. If the lords had been joint tenants, the rule that a person cannot be lord and tenant at the same time would have applied ; but here the same party has the

entire copyhold, and only half the manor. In the case referred to in Calthorp, 97, a copyholder and another purchased the manor in *joint tenancy*—this was held to be a complete extinguishment of the copyhold, because each tenant had the entire manor.

I consider it clear that if there be any extinguishment at all, it must be of the entire copyhold, and it is difficult to see how such an entire extinguishment can take effect in a moiety of the manor to the prejudice of the owner of the other moiety.

The manor may exist in A. and B. as lords, and the copyhold in A. only as tenant.

It was decided in *Bingham v. Woodgate*, 1 Russ. and M., 32, 750, that a tenant for life of a manor purchasing a copyhold tenement held thereof does not extinguish the tenure absolutely. This is the same in principle as the moot point in question. There must be a perfect lord, and a perfect tenant to work an extinguishment.

As to the second point, I do not consider that the 3 & 4 Will. 4, c. 106, has altered or affected descents in borough English, in any way further than settling clearly from whom the descent is to be traced.

P. W. L.

No. 54.—*Legacy Charged on Land—Vesting of* (p. 141, Supp.).

It has been decided that a gift of interest, until the legacy becomes due, will not vest the principal when the legacy is charged on land, but if the legatee dies before time of payment, the legacy is lost (*Gawler v. Stauderwicke*, 1 Bro. C. C. 106). On the authority, therefore, of the above case the legacy in question will necessarily, I think, sink into the land for the benefit of the devisee. Where, however, a legacy is not charged on real estate the case is different, for in *Jackson v. Jackson*, 1 Ves. sen. 217, the testator there bequeathed to his son £400, *to be paid to him* at the end of one year next after his, the testator's, death, and the further sum of £100 at the death of his mother. The question was whether the son took a vested interest in the £100, and Lord Hardwicke determined in the affirmative, observing that the legacy of that sum was plainly vested, and the time of payment only postponed, for the former words, "to be paid" were to be carried on, as they would clearly be, if termed with any other language.

C. W. (Kendal),

No. 47.—*Incorporeal Right—Window*.

To gain a prescriptive right to the use of the light, A. must have enjoyed it for twenty years in the character of an easement, and distinct from the occupation by him of B.'s premises (see *Harbridge v. Warwick*, 18 Law J. Reports, N. S., Exch. 245).

LEGULEIUS.

No. 56.—*Devise, Entail, &c.* (No. 9, N. S., p. 142).

In answer to this question we will consider the law as it stood previously to the act 1 Vict. c. 26, and the law as it now stands. First, then, as to the law as it stood previous to the act. A devise to A. for life, and, if he should die without issue, over to B., would have given A. an estate tail by implication, remainder to B. (see *Blackburn v. Edgley*, 1 P. W. 600; also *Hope v. Brown v. Taylor*, 1 Burr. 268). I conceive that the devise in the question is the same in effect as the devise above set forth. C. D. would, therefore, have taken an estate tail, remainder to E. F. An assurance perfected according to the requirements of the act 3 and 4 W. 4, c. 74, would bar the estate tail, and all estates and interest to take effect after, or in defeasance of, such estate tail. Consequently, E. F. would, by the disentailing deed, have been barred. The law, however, with respect to this case has been materially altered by 1 Vict. c. 26. The 29th sect. of that act changes a devise to A. for life, and, if he should die without issue, over to B., from an estate tail by implication in A., with remainder (vested) to B., into an estate *for life* in A., with remainder (contingent) to B., and such remainder being contingent, and unprotected by an estate in a trustee, may, of course, be destroyed.

If, then, the proposition lastly laid down be law, C. D. will take an estate *for life*, remainder (contingent) to E. F. Whether E. F. can recover the property will depend on the question whether his contingent remainder has been destroyed or not.

If E. F. was in esse (as I suppose he was) at the time the disentailing deed was executed, I think his contingent remainder will not be destroyed. If the deed was an innocent conveyance, then it would transfer such estate as the tenant for life had and no more, and E. F.'s contingent remainder would take effect upon C. D.'s death. If, however, the deed was of a tortious nature then it would work a forfeiture, and E. F. would be entitled to enter from the time of the execution thereof. In neither of the above cases will the contingent remainder be destroyed because E. F.'s estate is ready to take effect upon the determination of C. D.'s estate (see *Fearn on Contingent Remainders* by Butler, chap. 5 and note; also *Hayes's Introduction to Conveyancing*, p. 25). It appears to me, therefore, that E. F. is entitled to the property. ROBERT W. TAYLOR.

No. 48.—*Power of Appointment—Exercise of by Married Women.*

B. A. could, *without her husband's concurrence*, execute the power. See *Sugden on Powers*, Vol. I, p. 182, where it is said: "It is not material whether the power is given to an unmarried woman who afterwards marries, or to a woman while she is married or upon her marriage, and she survives her husband, and afterwards takes another: in all the cases she may execute the power, and the concurrence of her husband is in no case necessary." LEGULIUS.

ON THE LAW OF COVENANTS.

[Continued from Supp. p. 155.]

Effect of covenants in equity.—Courts of equity exercise a jurisdiction over covenants, so as to enforce their specific performance. However, if the covenant be merely for payment of a sum of money, or for the transfer of stock, as an action at law would give all the party could justly claim, courts of equity will not give relief. The case of a married woman having separate property stands upon its own peculiar grounds. And whenever a party can have a remedy either in equity or at law, he must elect which he will adopt, for it will not be permitted that he should drag the covenantor before both courts.

Breach of trust.—Equity does not perform an agreement specifically in every case in which an action would lie at law; a familiar instance of this is the case of a covenant by a trustee to grant a lease under circumstances which would be a breach of duty. It would be a very anomalous thing for such a court, which punishes a breach of duty, to compel the trustee to commit one. Equity, therefore, leaves the covenantee to his remedy at law (see *Bellringer v. Blagrove*, 1 De Gex and Smales, 63; S. C. 11 Jur. 407; *Worley v. Frampton*, 5 Hare, 560; S. C. 10 Jur. 1092; 16 Law Journ., N. S., Chanc. 102). In the former case a bill for the execution of a covenant contained in a renewed lease granted by trustees was dismissed, the covenant being *ultra vires* of the trustees.

Mistake, fraud, &c.—If there be a clear mistake, or there is fraud on the part of the party seeking to enforce the covenant, or a surprise on the covenantor, equity will not compel the covenantor to perform the covenant. This doctrine does not, as might at first sight be thought, interfere with the provisions in the statute of frauds. Parol evidence is allowed of the fraud, &c., because the statute of frauds does not say that you shall not avail yourself of any defence you may have, but it merely enacts that no person shall be charged with the execution of certain agreements who has not personally or by his agent signed a written agreement. In other words, the statute does not say that a written agreement *shall* bind; but only that an unwritten agreement shall not bind (2 Story's Princ. Eq. s. 770; *Clinan v. Cooke*, 1 Scho. and Lefr. 39; *Clarke v. Grant*, 14 Ves. 524; *Townshend v. Stangroom*, 6 Ves. 328).

Complete and incomplete transactions—Estate liable.—Equity will not grant a specific performance of a covenant which does not
SUPP. No. 11.]

create a complete and perfect title at law, unless it is founded on a valuable consideration. Thus, it will not interfere on behalf of a settlor under an imperfect voluntary settlement (6 Law Stud. Mag. 142—146). A covenant to surrender a copyhold gives a right of action for damages for non-performance. Now this is a right complete and valid, therefore since the title to damages is complete, a court of equity will afford to the covenantee that remedy which a court of law would give him, so that he shall have the value of the damages which he could get at law, and a reference will be directed to ascertain the amount of damages. This is to be understood of cases where a court of equity has obtained cognisance of the case by other means, as in an administration suit (see *Lomas v. Wright*, 2 Myl. and K. 769; *Fletcher v. Fletcher*, 2 Cox, 107). The principle of this is, that during the covenantor's life it is a mere pecuniary demand, whilst after his death it becomes a specialty debt. It is no longer the case of a pecuniary claim which may be fixed by a jury, but we have another ingredient imported into the engagement—namely, it may be enforced against some specific property, so that in truth the case is just the same as if the covenantor had originally charged his estate with the specific sum. The law imposes on the estates of the deceased the liability to satisfy (so far as it will extend) his debts. There is, in fact, a trust for payment of the deceased's debts, and this trust is by the Court of Chancery imposed on the executor or heir in respect of the deceased's estate. The trust is not on the property, but as between creditors and these representatives the duties of trustees are imposed on the latter. At law no specific estate is charged with the covenants of the deceased; his representative is liable, but no particular estate is charged. So equity holds that the representative is liable in respect of the deceased's liability, but that the estate is not liable (except, of course, registered judgments). Thus claims which may affect the estate are enforceable against the executors; the property is not trust property, but the executor and the heir are trustees. There is one exception to this rule of the property not being affected with a trust for the creditors, and that is where the heir or executor makes a voluntary or fraudulent disposition. In such case the party who takes thereunder *with notice* of the fraud is affected, and the estate itself is liable to the claims of creditors. Subject to this one exception the rule which prevails alike at law and in equity is, that the estates, real and personal, of the deceased, are not in themselves charged with covenants, but that the representative is charged, and consequently the executor's alienation is good as against a creditor by covenant. So that as to a claim under a covenant of deceased, though in equity there is a *quasi* specific performance, there is no trust against the estate, with the one exception above noticed; it is

merely a trust binding the person of the representative in respect of the estate coming from the testator.

Covenant creates a trust—Wife's separate estate.—The effect of a covenant in a court of equity is to create a trust against the property in respect of which it is made. To effect this there must be property upon which the covenant may attach; therefore, if the covenant be to pay a sum of money, even after the death of the covenantor, there is nothing upon which it can attach. However, in the case of a married woman, having separate property, a covenant will be binding on such separate property, and it will be enforced in equity. In such a case there could be no remedy at law, and, therefore, unless equity relieved, the creditor would be without remedy. So her promissory note will be enforced wherever it can be shown that she entered into the contract as a feme sole having power to act in respect of certain property (see *Princ. Equity*, 443; 6 *Law Stud.* 328, 329).

If one man covenant that a particular act shall be done by another, as if A. covenant that B. shall convey certain lands, there is nothing but a personal charge, and the land is not affected. In order to create a trust upon the property mentioned, it should be the property of the covenantor, and it will not be sufficient that it is the property of a party named in the deed as the party who is to perform the act.

Champerty.—Equity will not enforce the specific performance of covenants which are affected by champerty or maintenance, *i.e.*, the sale of or dealings with litigated rights of action (see *Strange v. Brennan*, 10 *Jur.* 649).

Wife's fine, &c.—Suppose that a husband covenanted that his wife should levy a fine or acknowledge a substituted deed, but wife does not do so, *i.e.*, she either refuses or neglects, what are the rights of the covenantee? From the case of *Emery v. Wase* (8 *Ves.* 517; see also 5 *Id.* 848), it is clear that Lord Eldon considered that there were great objections to enforcing the covenants against the husband, if the wife refused to perform them. It is to be remembered that the fine, or the substituted assurance, is to be the free and voluntary act of the wife, but to enforce the husband to perform the covenant would be to force her will. However, in former times it was considered that the husband must perform the covenant (*Morris v. Stevenson*, 7 *Ves.* 474), but this doctrine has long ceased to be considered as the invariable rule, but yet it is too early to say that the doctrine is of no weight (see *Martin v. Mitchell*, 2 *Jac. and Walk.* 425; and the judgment in *Howell v. George*, 1 *Madd Rep.* 9; also 2 *Sory's Eq. Jurisprud.* s. 731—735). The probable result now would be that the courts of equity would, where the husband shows that it is impossible that he can perform the covenant, refuse to compel him. He would, however, be liable at law to damages (*Davis v. Jones*, 1

New Rep. 267). Even where the wife covenants, it should seem that it is only where she has separate property, that the courts will compel her to levy a fine or execute the substituted conveyance; at least this is certain, that she will not be committed for contempt on her refusal, because it would be a violation of the rule of law that she shall exercise a free will (see *Jordan v. Jones*, 2 Phill. 170; 16 Law Journ., N., Chanc. 93; 10 Jur. 1067; *Billings v. Webb*, 12 Jur. 427). In the former case it was decided that the Court of Chancery will not make a peremptory order upon a married woman to execute a conveyance of an estate not settled to her separate use.

Effect and consequence of covenants in cases of bankruptcy and insolvency.—The general rule is, that where a creditor of a bankrupt cannot prove his demand under the fiat, the certificate will not bar the claim; but, on the other hand, it is to be remembered that the policy of the law is to exonerate the bankrupt from all debts and demands which can be proved under the fiat. If a debt be payable *in presenti* or *in futuro*, or on a contingency, it is in general proveable; if the claim is for an unliquidated demand it is not proveable. When a man covenants absolutely to pay a sum of money it is to pay at some fixed time, or on demand, or not at any fixed time. The question is, is the money agreed to be paid a debt or not? To constitute what is technically called a debt the contract must have been broken before the time of the bankruptcy; for if the contract has not been then broken no action could be brought, and, consequently, there is no debt proveable. In the case of a covenant not fixing any precise time, there is no proveable debt unless at the time of the bankruptcy there was a breach of the covenant. But there are some statutory provisions for proof where the credit has not expired, or where a debt is payable on a contingency which has not happened at the time of the bankruptcy. As to unliquidated demands, they differ from debts in these respects, namely, that they are uncertain and not ascertainable; for where the amount can really be ascertained it is not an unliquidated demand, but a debt. A loss or contract of unascertained amount is not proveable, though it be ascertained before certificate but after the fiat. So a demand will not be the less an unliquidated one, because it is to be established by some well-known principle of law (see *Woolley v. Smith*, 4 Dowl. and L. 469; S. C. 3 Com. Bench Rep. 610; 16 Law Journ., N. S., C. P. 81; 11 Jur. 310). There is a not uncommon class of cases to be mentioned, namely, where a sum is named in a deed of covenant by way of *penalty*. Let us suppose that otherwise the damages would be unliquidated, does this mention of a penal sum make any difference? Even courts of law will not give more than the actual damage, and, therefore, the party is not allowed to prove for anything, as it is still a case of unliquidated damages (see *exp. Maclean*, 2 Mont. Deac. and De Gex,

564). In this case the bankrupt undertook to supply a creditor, who was under pecuniary engagements for him, with five pieces of cloth per week, or to forfeit and pay £10 per piece as liquidated penalty for every piece deficient. The bankrupt made such frequent default in the regular supply of the cloth that he incurred penalties to the amount of £3,870, which the creditor claimed to prove, although no specific damage was alleged to have been sustained by him by the non-performance of the agreement, and the only balance really due to him was £48 18s. 6d. It was held that this was a claim for unliquidated damages, founded on a penalty, and was, therefore, not the subject of proof.

However, the parties may agree upon a certain sum, and then it is liquidated damage, and it would be treated as such in a court of law, though courts of equity are less willing to adopt such contracts. In order to be binding, there must be a clear exclusion of the enquiry whether the sum is larger or not than the parties intended in the circumstances that have happened. A court of equity is not, in general, bound by a mere declaration that the sum named shall be deemed liquidated damages.

Effect of insolvency on covenants.—It may be stated in general terms, that, as to all claims under covenants entered into by insolvent debtors or insolvent petitioners, the rights of the covenantee under the covenants are determined as against the insolvent. Consequently after the discharge or the final order the insolvent cannot be sued, except when the claim arises in respect of unliquidated damages. The terms of the statutes (1 & 2 Vict. c. 110, ss. 75, 80, and 7 & 8 Vict. c. 96, ss. 22, 25) embrace only debts and demands payable *in futuro*, or on a contingency; but there is nothing in the act which embraces claims for unliquidated damages. Therefore, a covenant to convey lands is not affected by the discharge, but the insolvent may after his discharge be sued personally for same. Even where the claim is proveable the future estate of the insolvent is liable, but then this can be only through the medium of the judgment entered up by the official assignee.

Covenant creating debt in equity.—Allusion has been before made to the distinction between the actionable effect of a covenant, and its effect, as creating a debt. There may be a case in which, from some cause or other, there can be no remedy at law, as for want of form, &c., yet the covenant may be sufficient to enable a court of equity to raise a liability against the estate of the covenantor. All that is necessary for this purpose is, that there be an intention manifest to create a valid claim. *Copland v. Martin*, 9 Sim. 433, exemplifies this. However, it is very possible that an action might have been sustainable in that case. An important class of cases in which the doctrine is frequently applied is, where a person acknowledges to have

received a fund by an instrument under hand and seal, and afterwards by some neglect or misconduct he misapplies it. In this case it is important to show that the party became a debtor by specialty, but in order to do this it is not necessary to show that the party entered into any contract to perform a trust; it is sufficient to show the execution of the deed, and that he received the money for the purposes of the trust. We may suppose the party to have acknowledged receiving the money for certain purposes without intending to create a specialty debt. What is the effect of the acknowledgment under seal? If there had been no acknowledgment under seal, the party would have been liable as for a simple contract debt. So the persons for whom the trust is meant may not be parties to the acknowledgment, so that it might be doubtful whether there was any contract or privity. The result of the authorities is that, whether there is a contract or not, whatever is the immediate purpose of the acknowledgment, and whether or not the persons interested be parties to the instrument, the acknowledgment of the trustees under seal constitutes a specialty debt as against the estate of the trustee (see *Mavor v. Davenport*, 2 Sim. 227; *Turner v. Warden*, 7 *Id.* 80). In this last case no action at law would have lain. In the application of this doctrine some caution is necessary; it is not sufficient that the trustee has received the money in pursuance of the deed which he has executed, for it does not follow that because money is paid to him he is a trustee. There must appear in the acknowledgment an agreement to hold the fund on the trusts specified, and then the receipt of the trust fund will render him liable for its misapplication. All the authorities are confined to cases in which the money is paid to the trustee at the time of the execution of the deed, or clearly in pursuance of the deed.

Covenants not to sue.—There is another very important class of cases, which is where one man is indebted to another on bond or simple contract, and the creditor covenants with the debtor not to sue him in respect of that claim. A question arises, whether the covenant is anything more than an obligation not to sue, or whether it operates as a release of the claim. If it is a release, it will, of course, be pleadable to any action; if not a release, it cannot be pleaded with any effect, in a court of law, though a court of law says that the obligation may operate by way of release, as presently stated. Of what character is this covenant not to sue? The law endeavours to avoid circuity of action, and to effect this holds the deed to be a release whenever it can do so. If it did not, when the creditor sued the debtor, the latter would sue the former for breach of his covenant, and the measure of damages in each case would be the same. It is for this reason that the courts learn to construe such instruments as releases. Suppose in a case where there are

several co-obligors, a creditor covenants not to sue one of these co-obligors, will it be a release or not? To answer this we must advert to the effect of a release to one of several co-obligors. A release to one of several obligors, whether jointly, or jointly and severally bound, is a release to all the obligors. The principle may be stated in the form of a syllogism: a personal action once suspended is for ever discharged; where the duty is entire a discharge as to one is a discharge to all; therefore the creditor's agreement to suspend an action against one is a release to the other co-obligor or co-obligors (see *Cheetham v. Ward*, 1 Bos. and Pull. 633; also 2 Will. Saund. 47 gg., note). A covenant not to sue one of several obligors, if it is a release to one, is a release to all. Now a covenant not to sue in the case of a sole obligor is not a release in its own nature, but only constructively to avoid circuity of action. So far as concerns the frame of the deed, the intention is only to give a mutual remedy, therefore, to consider the covenant as a release would be to go far beyond the intention of the parties. It is not, therefore a release, and cannot be pleaded as such, for it is in its own nature only a release by construction of law (see *Lacy v. Kynaston*, 1 Ld. Raym. 688; S. C. 12 Mod. 548; *Dean v. Newhall*, 8 Term Rep. 168; *Hutton v. Hare*, 6 Taunt. 289; *Walmsley v. Cooper*, 11 Adol. and El. 216; *Thimbleby v. Barron*, 3 Mees. and W. 210; Selw. N. P. 590, 11th edit.). There are authorities to show that though the subject be in form a release to one of several, yet by construction it may be interpreted to be a covenant not to sue merely; the party may in terms purport to release, yet if the design clearly was that a particular obligor only should not be sued, the court is not bound down to technical expressions, but will read it as a covenant not to sue. So a covenant not to sue will sometimes operate as a release. Courts of law where a deed will operate in two ways will give it the most favourable construction. Therefore, if the clause is inartificially framed as a covenant not to sue, and not as a release in words, it will not be sufficient to say that because it is expressed to be a release, it cannot be a mere covenant not to sue. The courts are now liberal in their construction of deeds, and they do not feel bound because the word "release" is used, to construe it as a release, if an intention can be collected that it should be merely a covenant not to sue (see *Taylor v. Homersham*, 4 Mau. and Selw. 423; *Solly v. Forbes*, 4 Moore, 448). These cases should not be relied on too much in practice (see also *Thompson v. Lack*, 3 Com. B. Rep. 540; 16 Law Journ., N. S., C. P. 75; *Kearsley v. Cole*, 16 Mees. and W. 128; S. C. 16 Law Journ., N. S., Exch. 115), which decide that if one of several co-obligors be released, a provision expressly for saving rights against the other co-obligors, is effectual to keep alive the

rights against co-obligors. It is not, therefore, strictly a release, but a covenant not to sue.

As to the effect of a covenant not to sue: if it is general and in favour of a single party it is a release; but this doctrine does not apply unless the covenant not to sue be unlimited. The reason for holding it to be a release is to avoid circuity of action. The rule is that the breach of a covenant, or other agreement not to sue, renders the creditor liable in damages for suing, but it is not pleadable in bar of the action (see *Jukes v. Jeffreys*, Cro. Eliz. 362; *Thimbleby v. Barron*, 3 Mees. and Wels. 210). The ordinary form of a covenant not to sue in a composition deed states that if, or so long as, the debtor observes the agreement then made, the creditor will not sue him. Thus it only binds the creditor conditionally, and therefore if the debtor do not keep his covenant or agreement, there is no release at all, and, of course, the debtor cannot plead the covenant as a release. In framing a covenant not to sue, the object is that the creditor shall forbear to sue, and not that there shall be a suspension of his rights, for then it would be really a release. If the object of the transaction be that the creditor shall forbear suing on certain conditions, or for a certain time, you must make the creditor contract so as to render him liable for damages if he sue, but not to enable the debtor to use this covenant as a release. In other words, you must not suspend the plaintiff's right to sue, for that would be an extinguishment, and that, too, though the conditions of the deed were not observed by the debtor. It must be borne in mind, in framing the covenant, that if it is general, in the case of a single obligor, it will be a suspension, and consequently a release, on the principle that a right to bring a personal action being once suspended, it is extinguished for ever (1 Bos. and Pull. 630, 633; 2 Dyer, 140 a. pl. 39). And care must be taken not to insert a clause, as is frequently negligently done, enabling the debtor, if sued, to plead the covenant as a release. Not even a contingent right to plead it in bar should be given. In conclusion it may be stated that it is a rule of the courts of law that when parties have used language which admits of two constructions, the one contrary to the apparent general intent, and the other consistent with it, to assume the latter to be the true construction (*per Gibbs, C. J.*, in *Hutton v. Eyre*, 6 Taunt. 289; S. C. 1 Marsh. 603; *per Dallas, C. J.*, in *Solly v. Forbes*, 2 Brod. and Bing. 38). The most recent and satisfactory case upon the subject of covenants not to sue is *Ford v. Beech* (17 Law Journ., N. S., Q. B. 114; S. C. 12 Jur. 310; over-ruling the decision of the Queen's Bench, 11 Jur. 299; 16 Law Journ., N. S., Q. B. 100, where, however, this point was not raised). In this case, the first count of the declaration was on a promissory note by the defendant for £140, payable

to the plaintiff twelve months after date. The second count was on a promissory note by the defendant for £200, payable to the plaintiff two years after date. The defendant pleaded to the first and second counts, that, after the making of the notes, and after they became due, it was agreed between the plaintiff and the defendant, and one A. B., that A. B. should and would, at the request of plaintiff, pay to the plaintiff, in trust for E. B., the sum of £200, for her own sole use and benefit, or the sum of £25 per annum, so long as the sum of £200 should remain unpaid, which sum of £25 should be paid quarterly, as therein mentioned, and that the rights and causes of action of the plaintiff upon and in respect of the notes, should be *suspended* so long as A. B. should continue to pay the sum of £6 5s. every quarter. There was an averment that A. B. duly paid the annual sum of £25 quarterly, according to the agreement. The plaintiff, in his replication, traversed this payment, but the defendant had a verdict on the issue, so that, in effect, it was found that A. B. had performed the agreement, and, therefore, the defendant should not, under the agreement, have been sued. The Exchequer Chamber held that in order best to effectuate the intention of the parties, the agreement must be construed to mean that the plaintiff agreed to forbear his suit until the quarterly payments should cease to be made; and that the legal effect of such agreement was, *not* to suspend the plaintiff's right of action upon the notes in the meantime, but to subject him to an *action for damages* in the event of his suing contrary to the agreement, and, consequently that the defendant's plea in this case was no bar to the action for the amounts of the promissory notes. The judgment of the court deserves a careful perusal.

CORRESPONDENCE.

Examination Answers.

SIR,—As a subscriber to your MAGAZINE I (as probably some others) feel much interest in knowing how far I may consider the answers you furnish to the examination questions as examples of the *style* of answers which the examiners will require at the examination. I cannot suppose that your answers, were they made by a candidate, would be sufficient to satisfy the examiners that the party making them had a *full and correct* knowledge of the various branches of the law to which they relate. In the first place I would, with all deference, submit, that some are *evasive*, next that others are *not sufficient*, and I have at least, in *one* or more cases, met with *wrong* answers. In

looking through your publication I have fixed, *at random*, upon the questions propounded by the examiners at the Easter Term Examination for this year (1849). In the equity branch I find question VIII., as follows:—"What is the difference between an *evasive* and *insufficient* answer?" You give as an answer: "An *evasive* answer is, where the defendant merely answers the charge *literally*, without *confessing* or *traversing* the subject of such charge, &c."

Now can any one contend that this answer carries with it a sufficient explanation of the question? Let us look at it, and see what we *really* do get by it. 'Tis a mere negative statement. A statement that an *evasive* answer neither *confesses* nor *traverses* the charges in the bill. I admit that it states the charges are answered *literally*; but what particular legal magic that word carries with it I am at a loss to know. Does an *evasive* answer mean nothing more than an answer *avoiding*, by some matter of excuse or other, the charges in the bill? It certainly appears to me that you are rendering most *invaluable* assistance to the student, by telling him (if not in as many words, at least in *effect*) that an *evasive* answer is a *literal* one.

Again, we will go to question XIII., in equity, which (amongst other things) requires to know, "To what proceeding *in law* a traversing note may be compared?" We refer to your answer for the explanation, but find *none there*, not a word about it. In vain may we look for any assistance *there*. This part of the question is quietly passed over without the least notice. To refer again to question XIV.: "Explain the *purport* and *effect* of setting down a cause on bill and answer, &c." Surely you do not intend your readers to take the following as the correct answer:—"A cause is set down on bill and answer, where the defendant has, by his answer, suggested that the bill is defective for want of parties." What, I would ask, has this to do with *purport* and *effect*?

It appears to me (although I have no books to satisfy myself that I am correct), that the *purport* and *effect* of setting down a cause on bill and answer is, that the plaintiff thereby expresses his determination to abide by the decision of the court *upon the facts appearing upon the bill and answer alone*, without bringing *further matter* before the court for them to adjudicate upon, and to assist them in their decision.

In many cases I may be led to place confidence in your answers, and consider them as *correct*. I hope, therefore, you will pardon any anxiety on my part to have such answers furnished as may be worthy of attention, and may not mislead.

I do not expect to see your pages covered with "*long wordy*" explanation of the various questions, but I do think some little

more trouble might well be bestowed upon this portion of your
MAGAZINE.

Your's &c.,

Oct. 5. 1849.

E. H.

NOTE.—We have given insertion to the above communication, in order to show that we have no desire to stifle complaints respecting our publications, and also to give an opportunity for explanation respecting the Answers to the Examination Questions. Proceeding to notice the topics of this letter in their order, we must, in the first place, beg our subscribers not to be alarmed at the statement that answers similar to those we give would not secure a certificate from the examiners. To any one who has passed the ordeal, or has conversed with any who have, such a statement will appear most uncalled for. Still it would be well if every candidate would think the same, and we can assure them that if they only come a *little* below the mark they need not fear for the result of the examiners' scrutiny. We come next to the *random* answers incriminated by our correspondent. Firstly, ans. No. 8, Equity (Supp. p. 85). This answer is quite correct, as will be seen by turning to the authorities referred to. An example or two will make this clear. Suppose the bill charges that the defendant did such a thing upon such a day, or in such a place; it will not be sufficient for the defendant to deny that he did it "in manner and form as charged in the bill," but he must deny that he did it at the time mentioned, or at any other time, or at the place named, or at any other place. Again, suppose the defendant is charged with the receipt of £100, it will not be sufficient to deny the receipt of the £100, but he must deny that he received £100 or any part thereof. These instances exemplify what is meant by a *literal* answer being evasive. We should observe that in practice an evasive answer is considered and treated as an insufficient answer, though in some cases where the evasion has been gross, the answer has been taken off the file. Secondly, ans. No. 12, Equity (Supp. p. 86). We admit that we have not answered that part of the question which relates to the analogy of a traversing note to some proceeding at law, and for this very good reason, that we really could not. We know not to what proceeding at law a traversing note can be compared, and several to whom we have put the same question have been equally incapable of answering it. We shall be glad to be enlightened. We may just state that we suppose the examiners alluded to the plea of the general issue, the effect of which is to traverse the statements in the declaration. But what comparison there can be between this proceeding, which is the *defendant's* own act, and a *plaintiff's* traversing note in equity, we cannot tell. We observe that our correspondent does not assist us in this as he has done in the other instances. Thirdly, ans. No. 14. We confess that this answer is not what we believe, on further consideration, the exa-

miners were aiming at. We suppose it was the latter part of the question as to a corresponding proceeding at law that led us off the right scent. The proper answer to the former part of the question would have been : Where, upon the answer alone, there is sufficient ground for a final decree or order, the plaintiff may proceed to a hearing without replying or examining witnesses. The plaintiff, however, thereby admits the allegations in the defendant's answer to be correct, and must rely on them for obtaining a decree. If these should be avoided by other matter in the answer, the plaintiff will fail (see further Pract. Equity, pp. 256, 257). We are not aware of any proceeding at law which corresponds to this, but shall be glad of any information on the subject. It was this that lead us to give for answer something that really bore a faint resemblance to a proceeding at law. And here we may be allowed to say that it is often no easy matter to ascertain what the examiners are driving at. For example take the following question : " What is the law as to the payment of the debts of relations and third persons" (Mich. T. 1846). We shall feel obliged for an answer to this in order that it may be inserted in our forthcoming *second* edition of the "*Key*." It is very easy to find fault with our answers, but it appears that no other publication is willing to take the trouble we do, though formerly the *Jurist* inserted some by Mr. S. Atkinson (vol. 2), and we believe that the *Legal Observer* gave some by students. We suppose the reason why they declined to continue the answers was that they found it a thankless office. We cannot, however, say that such has been our case *altogether*, for we have been thanked by several who have passed the examination for the aid our answers afforded them. We have no doubt that some of our subscribers would wish for longer answers, but we have not room for them, though we may mention, for the benefit of these parties, that in the second edition of the "*Key*" (the first division of which will appear in the course of this month) we shall give much fuller and more complete answers—indeed, so full, that we fear we shall lay ourselves open to the charge of over-elaborateness.

In concluding, we should state that we are not at all sorry that our correspondent has given us the opportunity of putting ourselves right with our subscribers, and we trust that he will not suppose that we are annoyed at any of his observations.—Eds.

MOOT POINTS.

Devise—Consent of Protector to Disentailing Deed.

A. by his will, made in 1820, devised an estate to B. and his assigns "for and during the term of his natural life, and after his decease unto the *heirs male* of his body lawfully issuing severally and successively one after another, the eldest of *such sons* being preferred before the younger;" and in default of such issue male, unto C. for his life, with remainder to the heirs male of his body lawfully issuing; and for want of such issue, unto his own right heirs for ever.

In 1840 B. sold the estate, and to prevent all difficulty as to whether he was tenant in tail or for life under the will, his eldest son agreed to join in the conveyance, and accordingly they, by a deed enrolled in Chancery, "granted and conveyed" the estate to the purchaser. The will was recited in the conveyance, but no mention whatever was made that B. joined in the deed as protector, or gave his consent to it in that character. Two questions are now raised upon the title—

1st. Did B. take an estate tail under the will, or only an estate for life?

2. Supposing that he took merely a life estate, as he would then be a protector within the meaning of the 3 & 4 W. 4, c. 74, did B., by granting and conveying the estate in the deed of 1840, give his consent in his character of protector, so as to satisfy the requirements of the statute, and so as, with the joining of his eldest son in that deed, to bar the estate tail?

STUDENS.

ANSWERS TO MOOT POINTS.

No. 17.—*Ejectment—Determination of Tenancy—Statute of Frauds*
(Supp. p. 44).

There can be no abandonment of an agreement by *parol*, and there is no distinction in this respect between the 4th and 7th sect. of the statute. *Marshall v. Lynn*, 6 Mees. and W. 109; 9 Law Journ. Rep., N. S., Exch. 126; *Stead v. Dawber*, 10 Ad. and El. 57; 2 P. and D. 447; 9 Law Journ. Rep. Q. B. 101.

But these cases imply a marked distinction as between *parol* and

written agreements, and the inference to be drawn is, that the latter *would* be available as annulling a prior parol, and I therefore think that the written agreement in this case to determine the tenancy in January, 1849, is quite valid, and that it thereby annuls and makes void the first.

Presuming such to be correct, an action of ejectment may properly be maintained against the lessee (who is then a tenant at sufferance) for possession of the premises, and also an action of *assumpsit* for use and occupation or recovery of rent up to the time of the demise, and not after (*Doe d. Batten v. Cheney*, Cowp. 256).

Where the title to the property is in dispute *assumpsit* will not lie, ejectment being the proper remedy (*vide* Woodfall's *Landlord and Tenant*, *et* Archbold's *ditto*).

Ejectment lies :—

1st. "Where a tenant holds over without landlord's permission, and against his consent, and after the term has expired by effluxion of time or otherwise."

2nd. "Where the tenant determines the lease by nonpayment of rent, or non-performance of covenants, and a right of re-entry and forfeiture are conditioned on breach of them." CAROLUS.

NOTE.—It is impossible to give any decided opinion without seeing the instrument, but as the agreement to quit was not to operate until a future day, it is not improbable that it was not a *surrender*. Indeed, it should seem that a surrender cannot be made *in futuro* (see *Doe v. Milward*, 3 Mees. and Wels. 328). It would most likely be an *agreement* for a surrender, and in this case an ejectment could not be brought, but an action would lie for non-performance of the agreement. Or a specific performance might be obtained in equity.—EDS.

No. 56.—*Devise—Entail, &c.* (Supp. p. 142).

Had the life estate under this devise been vested in any other person than C. D., that is to say, in any other than the parent of those to whom the estate tail was limited, a deed executed by him purporting to disentail the property would be totally invalid, as against those in tail, inasmuch as the latter estate being then separate and distinct from his could not take effect during his lifetime, and C. D. could not by any deed whatever convey, or in any way incumber, more than the freehold for his life. But here the devise is to C. D. for life, and his heirs, and in default of issue of the said C. D., with remainder over to E. F.

Now by the rule in Shelley's case, "wherever a man, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee, or in tail, the word heirs is a word of limitation

and not of *purchase*." Consequently C. D. will not take a life estate, as above supposed, but a remainder also in tail, and as that remainder will absorb according to the law of merger his life interest, the result is that he takes an estate tail in possession, and by virtue thereof has power to alien in fee simple absolute, or for any less estate, the lands so entailed, and thereby to bar himself and his issue and all persons having any ulterior interest therein (*vide* 3 & 4 Will. 4, c. 74; 1 Steph. Comm. pp. 237 and 308, and cases there referred to).

I am, therefore, of opinion that the deed was valid, and has effectually barred the estate in remainder to E. F. CAROLUS.

NORA.—If the will were made prior to the New Wills' Act, it seems clear that C. D. would take an estate tail, and consequently that his disentailing deed would effectually bar E. F. If the will were made subsequently to that act, we think C. D. would take an estate in fee, because the *intention* is the guide to the construction, and it is clear the heirs are to take, notwithstanding the words "for life." Besides, the last words in a will are to have effect. In this case, the limitation to E. F. would be an executory devise, and therefore not barrable by the tenant in fee; and even if C. D. should be held to be entitled for life only, with a remainder in fee to his heirs (for an estate tail it cannot be, see s. 29 of 1 Vict. c. 26), the limitation to E. F. would be an executory devise, and consequently not affected by the so-called disentailing deed of C. D. It has been decided that a disentailing deed under the 3 & 4 W. 4, c. 74, has no effect in barring future contingent estates, unless the party executing it was in fact a tenant in tail (*Slater v. Dangerfield*, 15 Mees. and Wels. 263).—EDS.

No. 55.—*Agreements—Lease—Stamp*. (No. 9 Supp. p. 141.)

I think the document referred to by Mr. Beaumont is liable to the *ad valorem* lease stamp, and that the 2s. 6d. agreement stamp will not suffice; and I beg to submit the following remarks as my reasons for arriving at this conclusion:—

The 7 & 8 Vict. c. 76, enacts (see sect. 4) "That no lease in writing of any freehold, copyhold, or leasehold land, or surrender in writing of any freehold or leasehold land, shall be valid as a lease or surrender, unless the same shall be by deed; but any agreement in writing to let or surrender any such land shall be valid, and take effect as an agreement to execute a lease or surrender." But this stat. is repealed by 8 & 9 Vict. c. 106, which enacts (see sect. 3) that "A lease required by law to be in writing of any tenements or hereditaments made after the 1st of October, 1845, shall be void at law unless by deed," and does not re-enact the clause in the previous act as to agreements. Under the stat. of frauds, 29 Car. 2, c. 3, no

lease for more than three years shall be effectual unless in writing (see further 2nd ed. Stephen's Commentaries, vol. 1, p. 274). Now this document referred to by Mr. Beaumont is not for more than three years, and therefore is not required to be in writing by law, and consequently not by deed under 8 & 9 Vict. c. 106. It will, therefore, take effect at common law as a lease, and the *ad valorem* stamp duty will attach. I may remark that an agreement made between 31st December, 1844 (the time when 7 & 8 Vict. c. 76, came into operation), and the 1st October, 1845, would operate as "an agreement to execute a lease," and the 2s. 6d. stamp would be sufficient.

As this is a subject of practical importance, I trust, if you deem my view of it correct, you will insert the above remarks in the next No. of the Law Students' Magazine, with any additional remarks of your own that you may think proper to make.

W. A. B. (Hastings).

No. 21.—*Dower—Conveyance* (v. 1, Supp. pp. 57, 94, 144).

We have been requested by two correspondents to give our opinion on this question, upon which opinions differ, as may be seen by the answers at pp. 94, 144. The point is one of great nicety, and not free from doubt. After much consideration, we have come to the conclusion that the wife's right to dower is not, in the view of a court of equity, taken away. It will be agreed on all hands that at law the wife's dower is effectually barred. In order that the reader may see the reasons why we arrive at a different conclusion with respect to courts of equity, we shall present various views of the subject. In the first place, it is clear that there was once an attachment of the right to dower at law. This right has to be divested, and that has clearly been done at law. But a court of equity looks to the substance of the transaction, and not to the legal effect of the deed—to the intention of the parties rather than the legal operation of the instrument. Now what was the intention of the parties on the mortgage being made? It was to make the property mortgaged a security for the money advanced—i. e., that as against the mortgagee and all claiming under him the wife's dower should be barred. This being the intention of the parties, and there being nothing in the instrument inconsistent with that intention, it should seem that on the reconveyance to the husband, the wife's right to dower, which as against him had never ceased, would re-attach upon the lands as her *former right*, and consequently that the declaration in the re-conveyance to uses to bar dower would have no operation as against this wife. It may be remarked, that the whole subject of a wife's right to dower out of an equity of redemption has been in great confusion, even in the

best text writers, arising mainly from not drawing a distinction between mortgages prior and subsequent to the marriage. However, this is not the place to enter into an explanation upon this point, but we may refer the reader to Park on Dower, p. 209—211, 350, 351, and Coote on Mortgages. Again, the books, whilst denying the wife's right to dower, allow her to redeem as a dowress. Mr. Parke, indeed, thought that the wife could not have her dower even in equity on her joining her husband in a fine, unless she were included by name in the proviso for redemption (Park's Dower, 351). Mr. Coote, however (Mortg. p. 642, 2nd edit.), says that the general rule is that the wife's concurrence to let in the mortgage shall not prejudice her rights, although the equity of redemption be limited to the husband and his heirs; but she shall, on his death, be admitted to redeem. The truth is that the doctrine itself has been of gradual growth, and that courts of equity are more than ever disposed to look at the *intention* of the parties, and to limit the operation of the instrument to the purposes appearing on the face of it. From what we have above said, it will be seen that we coincide in opinion with Mr. Haywood, whose answer displays a great knowledge of legal principles. We shall be glad to insert any communication from any other correspondent controverting our view of the question, as the point is really one of great importance.

Eds.

MOOT POINTS.

No. 62.—*Yearly Tenancy—Notice to Quit.*

In September, 1845, A. demised to B. a messuage or cottage-house and garden at the yearly rent of £18, as tenant from year to year, to enter upon the garden on the 14th day of February following, and the dwelling house on the 12th day of May then next. The entry and tenancy commenced at the above-named times.

On the 10th Oct. ult. B. gave a notice that he would quit the premises at May Day, 1850. Is such notice good? or should the notice have been given half a year previous to the 14th February, 1850—the time when he entered upon the garden?

In Woodfall's Landlord and Tenant, 7th edition, p. 275, it is said: "A tenant sometimes enters upon different parts of the land at different periods of the year, although all are contained in one demise. When this happens the notice to quit must be given with reference to the time of entry upon the *substantial parts* of the

SUPP. No. 12.]

demised premises, without regard to the other parts, which are auxiliaries only, though the tenant will be obliged to quit them at the respective times of his entry thereon."

If this be correct the notice is clearly good, because the dwelling-house is undoubtedly the substantial part of the demised premises, and the garden an auxiliary only.

I beg to observe that in this part of the country it has always been usual (or considered necessary) to give the notice on or before the 12th August, which is half a year prior to the 14th February.

W. T. (Burton).

No. 63.—Stamp.

By section 8 of 55 Geo. 3, c. 184 (the principal act now in force relative to stamps), it is enacted that all writings, matters, and things in respect whereof any duties shall be payable, are to be engrossed on parchment or paper *previously* stamped, on pain of a penalty of £5 upon a subsequent stamping (*vide* Chitty's Stamp Laws, by Hulme, p. 50, second edition). It is, however, a most common practice with the profession to procure their deeds to be engrossed *and executed* on blank paper or parchment, and afterwards to transmit these deeds executed in blank to their stationer, who as a matter of course procures the affixion of the proper stamps at Somerset House, without any affidavit as to special circumstances or penalty. It is true that a court of law would not inquire whether the proper penalty has been paid (*Reg. v. Preston*, 5 B. and A. 1028, 1034), but as deeds take effect from their delivery, I am anxious to be informed whether if a deed stamped subsequently to its execution were tendered in evidence, and proved by the opposite party to have been stamped after execution, it would be receivable as legal evidence without a re-execution by the parties, although the Stamp-office had affixed the proper stamps, as is their custom, within six weeks after such execution.

F. W. FREEMAN (Wimborne).

No. 64.—Will—Devise.

A. B. by his will (which was made in the year 1848 by the village schoolmaster). gave and bequeathed all his real and personal estate and effects to his brothers John and James, and the lawful issues of *his late* brother Nathaniel, their heirs and assigns for ever, as tenants in common, and not as joint tenants, and equally between and amongst the lawful issue of his said brothers John and James, and the lawful issue of his said nephews and nieces, descendants of his said brother Nathaniel, as shall be then dead, *such issue to take his, her, or their deceased parent's share.* John has not been heard of for upwards

of twenty years; James died two or three years before the will was executed, leaving four children, all of whom are now living. Nathaniel had seven children, six of whom are now living, the eldest, John, having at his death left eight children, who are also all living.

As all the male issue of Nathaniel and James were married previous to the year 1834, it is presumed that the wives will be entitled to their dower. I shall be glad to receive the opinion of your subscribers in your next number who are the parties entitled under the will, and what will be the respective shares of each.

J. E. G. B. (Swindon).

No. 65.—*Conditions of Sale, &c.*

The conditions of sale of an estate contain the following—namely: “That the vendor’s solicitor is to prepare the conveyance at the expense of the purchaser, but who may have it perused at his own expense by any solicitor he may require.” Upon this condition the following questions arise:—

1st. Whether after having signed the conditions, equity would compel a purchaser to abide by it; or could he, after having got his conveyance prepared, tender same for execution by the vendor, and enforce completion of his purchase, notwithstanding this clause; or could the vendor and his solicitor enforce the condition.

2nd. Would not a purchaser employing the vendor’s attorney, under the idea of the compulsory effect of this condition, be affected by constructive notice to the attorney of the vendor, of defects and incumbrances in the title.

T. D. LING.

No. 66.—*Husband and Wife.*

A. effected an insurance on the joint lives of himself and wife in £100, payable on the death of either of them, and in the policy the office covenants with A. in case of his wife’s death during A.’s life to pay him the amount, and in case of her surviving, then, on her death, to pay the amount to A.’s executors, &c. A. being indebted to C., the latter has had a valuation of the present value of the policy made, and has agreed to purchase all benefit in the policy.

Can A. alone assign to C. so as to pass the entire interest in the policy to the latter?

H. S.

No. 67.—*Demise.*

A, about 20 years ago, by mere verbal agreement, took a message with outbuildings, and about 80 acres of land, from year to year, of the trustees of one B. deceased, and has ever since occupied the same. In a certain part of the demised land near the canal wharf, and at the distance of near half a mile from the message and other buildings, there is a lime-kiln, which A. never made use of during the

first six years of his tenancy, but has ever since regularly used the same.

The tenant A. has now given notice to the trustees of his intention to quit the farm "at the following times—to wit: the lands with *their appurtenances*, on the 2nd day of February next, and buildings with *their appurtenances* on the 26th day of May also next," which are the times of the year he entered thereon respectively.

Quære.—Is the lime-kiln appurtenant to the lands or to the buildings; and, consequently, will the tenant have to yield up possession thereof in February, when he gives up possession of the land, or not until May, when his tenancy, as regards the buildings, will expire? It is certainly composed partly of bricks and mortar, though the top is only on a level with the ground, and is quite detached from any building.

P. S. HOLT.

No. 68.—*Devise—Estate Tail—Rule in Shelley's Case.*

A. B., a testator, devised certain real estates to C. D. for life, remainder to testator's wife for life or widowhood, remainder to E. F. and his heirs, in trust for G. H. for his life (*sans waste*), with ultimate remainder, as the said G. H. should appoint, and in default of appointment, to the *heirs of the body* of the said G. H., and in default of issue, in trust for the right heirs of the said A. B. the testator. The testator died in 1823. The tenants for life are now dead, except G. H.

What estate does G. H. take?

Should a conveyance of the property be enrolled to bar the estate tail, or would a conveyance from E. F., in respect of his legal estate, and G. H., in respect of his equitable life estate, with an appointment of the remainder, be sufficient?

H. G.

ON THE LAW OF COVENANTS.

[*Concluded from Supp. p. 169.*]

Exception or alternative covenant.—If there be a clause in a deed appended to a covenant which is not consistent with what has gone before, either the clause must be read as an alternative one or as a proviso, and then the question is, is it consistent with what has gone before? If it is not, then it is not obligatory (see *Friar v. Grey*, 12 Jur. 913; *Richards v. Bluck*, 12 Jur. 963; *Lindsey v. Capper*, 1 Exch. Rep. 579).

The reader is referred to the present number of the *MAGAZINE*

(vol. 1, N. S., p. 309, *et seq.*) for the residue of this lecture, the index having prevented its insertion here.

We have now finished the Lectures on Covenants, and as they have been printed partly in the *MAGAZINE* and partly in the *SUPPLEMENT*, we think it may be useful to state the places where they will be found, and the order in which they ought to stand. In this *SUPPLEMENT* the Lectures are pp. 11—19, 129—138, 150—155, 161—169, and the present pages; the reader will then go to vol. 1 *Mag.*, N. S., p. 309—313; afterwards going back to same vol. p. 29—36, restraint of trade; p. 57—63, simony; p. 85—91, resignation bonds; p. 113—119, charging benefice; p. 141—146, contracts on Sunday. Thus the whole of the Lectures on Covenants, though scattered about, may be readily referred to, and the indices will still further facilitate this.

We propose in the ensuing volume to give the Lectures on the "*Statute of Uses*," which will be found very useful and practical, particularly in reference to that little understood subject, *Resulting Uses*.

ERRATA, &c.

P. 21, *line* 13 from bottom, for " 862" read " 362 ;" *line* 9 from bottom for " debts" read " debt."

P. 55, *line* 17 from bottom, after " Estate for life," add, " See 1 Prest. Est. 27, 2nd edit.

P. 106, *line* 8 from top, for attaining twenty-one years of age, read " attaining twenty-five years of age."

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